

REPUBLIC OF KENYA



KENYA NATIONAL ASSEMBLY

*Paper laid
by the Chair
Transport Comm
12/9/12*

TENTH PARLIAMENT – FOURTH SESSION



THE JOINT COMMITTEE OF TRANSPORT, PUBLIC WORKS & HOUSING,
FINANCE, PLANNING & TRADE, AND BUDGET

REPORT ON

CANCELLATION OF TENDER FOR CONSTRUCTION OF A NEW
TERMINAL AT THE JOMO KENYATTA INTERNATIONAL AIRPORT

Volume 2 (Annexure)

September 11, 2012



PUBLIC PROCUREMENT OVERSIGHT AUTHORITY

Transforming Procurement

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ARB 3/08/VOL 1 (68)

6th September, 2012

Patrick G.Gichohi, CBS
The Clerk of the National Assembly
Parliament Buildings,
P.O.Box 41842
NAIROBI

Dear **Mr Gichohi**

RE: MEETING WITH THE JOINT COMMITTEE ON FINANCE, PLANNING & TRADE, TRANSPORT, PUBLIC WORKS & HOUSING AND BUDGET ON THE GREENFIELD PROJECT.

I refer to your letter referenced KNA/JC-FTB/CORR/2012/(05) dated 4th September,2012 which I received yesterday 5th September,2012 by which you invited me in my capacity as the Chairman of the Public Procurement Administrative Review Board to appear before the Joint Committee on Finance, Planning & Trade, Transport, Public Works & Housing and Budget, on the matter of procurement of the Greenfield Project by Kenya Airports Authority. After carefully considering the invitation, the Board held an emergency meeting this morning and after deliberations, I wish to inform you as follows:

1. The Public Procurement Administrative Review Board is a body established under Section 25 of the Public Procurement & Disposal Act 2005. Its function as specified in Section 93 (1) of the Act is to review complaints by candidates participating in public procurement who claim to have suffered or risk suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the Regulations.

*Mrs Abonyi
Mrs Wang
Mr. Muthengi
Please deal
wom
7/9/2012*

2. In discharging these functions, the Public Procurement Administrative Review Board hears oral submissions by the parties to a review, considers documents before it and renders its decision within the statutory period specified in the Act.
3. In the discharge of this function, the Board acts as a tribunal. Article 169(1) (d) of the Constitution defines subordinate courts as "any other courts or local tribunal as may be established by any Act of Parliament, other than courts established as required by article 162(2).
4. Insofar as the Public Procurement and Disposal Act, 2005 establishes the Public Procurement Administrative Review Board pursuant to section 25 cited above, the Board is therefore a tribunal in terms of Article 169(1) (d) of the Constitution.
5. Article 160(1) of the Constitution provides that: "In the exercise of judicial authority the judiciary constituted by Article 161 shall be subject only to this constitution and the law and shall not be subject to the control or direction of any person or authority."
6. Article 161 (1) of the Constitution provides that "The judiciary consists of the judges of the Superior courts, Magistrates, other judicial officers and staff."
7. Members of the Public Procurement Administrative Review Board are judicial officers in terms of Article 161(1) cited above by virtue of Article 260 of the Constitution which defines the term "judicial officers" as a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of a court established under Article 169(1) (d)."

It is the Board's view that insofar as the Public Procurement Administrative Review Board is a tribunal which is manned by judicial officers in terms of the definition supplied by Article 260 cited above, such officers are not subject to the control and direction of any person or authority in the discharge of their functions.

In view of the provisions of the constitution cited above, The Board is of the view that it would be highly inappropriate for the Chairman or any other Board Member to appear before the joint committee to answer questions in relation to the decision which the Board has made in the discharge of its functions as a tribunal, in the matter of the procurement of the Greenfield Project by the Kenya Airports Authority, as to do so would violate the concept of separation of powers as established in Article 1 of the Constitution.

Kindly note that the Greenfield Project was the subject of Application for review No 39/2012 and the Board rendered its decision on 29th August, 2012. Upon rendering the said decision the Board became functus officio of the matter and the parties have a right under Section 100 of the Act to challenge the decision in the High Court within 14

days. In the event of an appeal being filed the Board has to be joined as a party. Therefore it follows that the Board cannot discuss or comment on its decision in any other forum other than the High Court. I attach a copy of the said decision for your information.

In view of the gravity of this matter we take the liberty to copy this letter to the Honourable Chief Justice and the Honourable Attorney General as your letter raises a serious Constitutional issue.

Yours *Sincerely*



P.M.GACHOKA
CHAIRMAN,

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

Cc. Honourable Chief Justice of Kenya
Supreme Court Building
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NAIROBI

Honourable Attorney General of Kenya
State Law Office
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REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 39/2012 OF 31ST JULY, 2012

BETWEEN

ANHUI CONSTRUCTION ENGINEERING LIMITED
IN JOINT VENTURE WITH CHINA AERO-TECHNOLOGY
INTERNATIONAL ENGINEERING CORPORATION
(CATIC).....APPLICANT

AND

KENYA AIRPORTS AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Airports Authority in the matter of Tender No. KAA/ES/JKIA/658/DB for Design/Build tender for construction of the Greenfield Passenger Terminal Complex and associated works at Jomo Kenyatta International Airport.

BOARD MEMBERS PRESENT

| | |
|-----------------------|-------------------------|
| Ms. Judith A. Guserwa | - Member (in the Chair) |
| Mrs. Loise Ruhiu | - Member |
| Eng. C. A. Ogut | - Member |
| Ms. Natasha Mutai | - Member |
| Amb. C. M. Amira | - Member |
| Mr. Akich Okola | - Member |
| Mr. Sospeter Kioko | - Member |
| Mr. Joshua W. Wambua | - Member |

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Ms. Judy Maina - Secretariat

PRESENT BY INVITATION

Applicant-Anhui Construction Group Engineering Limited

Issa M. Mansur -Advocate
Nganga Mbugua -Advocate

Procuring Entity-Kenya Airports Authority

George Kamau -Legal Officer
Allan Muturi -GM-Procurement
Victor Arika -Legal Officer
Margaret Muraya -Procurement
Simon Githaiga -Engineer
Jonah Biwott -Procurement Assistant

BACKGROUND OF THE AWARD

Request for Proposals

Request for Proposals was advertised in the local print media on 22nd and 23rd June 2011. One hundred and twenty (120) bidders purchased the tender document following the advertisement. Five (5) firms submitted proposals by the submission deadline on 17th November, 2011.

Technical and Financial Proposal Received

The Technical and Financial proposal were submitted by the following firms:

- 1) Anhui Construction Engineering Group Co. Ltd (ACEG) & China National Aero-Technology International Engineering Corporation (CATIC) joint venture
- 2) Beijing Construction Engineering Group Co. Ltd. (BCEG) & Sinohydro Corporation Ltd. Joint venture
- 3) Larsen & Toubro Ltd.
- 4) Citi Bank (Submitted an Financial Proposal Only)
- 5) SIFIKILE

The Technical Proposals were opened in public while the Financial Proposals were held safe until finalization of the technical evaluation.

Table 1a indicates the details of the firms that submitted the Technical and Financial proposals.

Table 1a-Details of Firms that submitted Proposals on 17th November 2011

| Firm No | Name and address | Associating firms and areas of specialization | Nationality of lead firm |
|---------|---|---|--------------------------|
| 1 | Anhui Construction Engineering Group Co. Ltd. (ACEG) Address 230002 325 Wuhu Road, Baohu District, Hefei City, China | Joint Venture with China Aero-Technology International Engineering Corporation Ltd. (CATIC) Consultants: • Pascall & | Chinese |

| | | | |
|---|---|--|---------|
| | <p>Tel: +86 13960455510</p> <p>Contact: Huang Hongyou</p> | <p>Watson Architects Ltd.</p> <ul style="list-style-type: none"> • Triad Architects Ltd. • URS-Scott Wilson • Millar Management | |
| 2 | <p>Beijing Construction Engineering Group Co. Ltd.</p> <p>No.1 Gunalian Road, Xuanwu District, Beijing, 100055, China</p> <p>Tel: +8610-639227207</p> <p>Fax: +8610-63928055</p> <p>Contact: Qin Chao</p> | <p>Joint Venture with Sinohydro Corporation Ltd.</p> <p>Consultant</p> <p>AECOM Asia Company Ltd.</p> | Chinese |
| 3 | <p>Larsen & Toubro Limited, Construction, Buildings & Factories Mount Poonamalfee Road, Manapakkam, P.B. No. 979, Chennai - 600 089. INDIA</p> <p>Tel: 044 2252 6000, 22528000 Fax: 044 2249 33'7</p> <p>WWW.Lntecc.com</p> | None | Indian |
| 4 | Citibank | Financial proposal only | |

| | | | |
|---|----------|--|--------------|
| 5 | SIFIKILE | Africa Airport Design Group Theunissen Jankowitz Architects Boogartman & Partner Architects Ambro Afrique Consultants | South Africa |
|---|----------|--|--------------|

Appointment of Evaluation Committee

The evaluation team comprising the following Seven (7) members was appointed to carry out evaluation of the Technical proposals under the chairmanship of Eng. Francis Ngigi

EVALUATION OF TECHNICAL PROPOSALS

General Approach

The evaluation team adopted the evaluation criteria in the RFP. Out of the five proposals received, only four(4) were subjected to technical evaluation as Citibank submitted financial proposal only

Mode of Carrying Out the Evaluation

Each member independently went through each of the technical proposal and summarized any shortcomings observed against the requirements of the RFP which was then presented in the second committee meeting held to finalize the assessment of proposals on the preliminary evaluation.

The Four (4) proposals received were subjected to a preliminary evaluation to determine those that met the minimum mandatory requirements. The

mandatory requirements as per clause 3.2.2 of the appendix to instruction to bidders were:

- i) Shall be an entity legally incorporated in the country of domicile or a joint venture linking such entities for purposes of carrying out and completing the works in this Tender
- ii) Shall provide evidence of past experience
- ii) Shall provide evidence of have carried and completed at least 1 No. Similar sized International Airport project in the last ten (10) years.
- iii) Shall provide evidence of having carried out and completed at least one other urban mixed use commercial development of a similar floor area in the last five (5) year.
- iv) Shall have consultancy capability through having designed and supervised the construction of at least one similar sized International Airport project in the last five years.
- v) Shall meet Minimum average annual construction turnover of US\$200million or equivalent in other currencies for the entity or for the lead firm. The turnover shall be calculated as total certified payments received for contracts in progress or completed, within the last FIVE_(5) years
- vi) The bidder shall submit a letter of commitment/ interest or intent to finance the project from a financier(s).
- vii) The bidder shall provide a tender surety of KES 300 Million
- viii) The bidder shall provide schedules on suitability of specialty equipment to be evaluated under Appendix to Instruction to Tenderers annex 6 item 4.

- ix) Power of Attorney committing the signatory to the Bid to sign the Bid
- x) Joint Ventures Shall submit copies of their joint Venture Agreement as per bid requirements
- xi) Information on past Non-Performance and Litigation History
- xii) Submission of Audited Accounts for the last 5 years
- xiii) Details of Key Personnel and their CV's

Table 1b, details the preliminary evaluation against mandatory requirements to determine which firms would qualify for detailed technical evaluation.

Table 1 b- Preliminary Evaluation / Analysis

| Item | CRITERIA | BIDDERS | | | |
|------|---|------------------------|------------------------|------------------------|-----------------|
| | | 1. ACEG + CATIC | 2. BCEG + SINOHYDRO | 3. LARSEN & TUOBRO | 5.SIFIKILE |
| 1 | Bidder including Joint Venture Partners or all members of the Consortium Shall meet eligibility requirements stipulated in the Bid Document Appendix to Instruction to Tenderers' Clause 3.2.1 and 3.2.2. | | | | |
| | Eligibility Requirements Shall be: | | | | |
| (a) | The Bidder shall be an entity legally incorporated in the country of domicile or a joint venture linking such entities for purposes of carrying out and completing the works in this tender | Provided Documentation | Provided Documentation | Provided Documentation | Did not Provide |
| (b) | Evidence of previous experience. These shall be completion certificates from past Clients/Employers. Evidence of works carried out as per the requirements in Clause 3.2.2 shall be provided | Provided | Provided | Provided | Did not Provide |

| Item | CRITERIA | BIDDERS | | | |
|-------|--|--|--|---|------------------------|
| | | 1. ACEG + CATIC | 2. BCEG + SINOHYDRO | 3. LARSEN & TUOBRO | 5. SIFIKI LE |
| | Qualification Requirements | | | | |
| (i) | Lead Contractor Shall have carried and completed at least 1 No. similar sized International Airport Project in the last ten (10) years. The size shall correspond to the number of contact gates and aircraft stands | Provided <ul style="list-style-type: none"> Shenzen BoAn Internatinal Airport | Provided <ul style="list-style-type: none"> T3 Beijing Capital Internatio nal Airport T3 | Provided <ul style="list-style-type: none"> Indira Gandhi Interna tional Airport | Did not Provide |
| (ii) | Lead Contractor Shall have carried out at least one other urban mixed use commercial mixed use commercial development of a similar floor area in the last five (5) years. | Provided <ul style="list-style-type: none"> Apartment Building for Hefei shiji Jinguan Hotel | Did not Provide <ul style="list-style-type: none"> World Trade Center does not meet floor area criteria Microsoft China Resource center does not meet floor area criteria | Provided <ul style="list-style-type: none"> ICICI Bank Buildin g | Did not Provide |
| (iii) | The Lead Design Consultant in the Design/Build team shall have designed and supervised the construction of at least one similar sized International airport project in the last five (5) years. | Provided <ul style="list-style-type: none"> Terminal 5 Heathrow airport | Did not Provide <ul style="list-style-type: none"> – Provided documents of projects undertaken by AECOM US Inc and not AECOM Asia Ltd. which is what is associated firm in the bid | Provided <ul style="list-style-type: none"> Indira Gandhi Interna tional airport as an EPC project with in-house Consul tants | Did not Provide |
| (iv) | Project Financing : The bidder shall provide a letter of intent from the financier to fund the works as per the terms and conditions of the Bid | Provided <ul style="list-style-type: none"> China Developm ent Bank China Exim Bank | Provided <ul style="list-style-type: none"> China Exim Bank | Provided <ul style="list-style-type: none"> Deutsc he Bank | Did not Provide |
| (v) | The Bidder Shall provide a tender surety of KES 300 million | Provided <ul style="list-style-type: none"> Commerci al Bank of Africa | Provided <ul style="list-style-type: none"> Kenya Commerci al Bank | Provided <ul style="list-style-type: none"> Citi Bank | Did not Provide |
| (vi) | The Bidder Shall provide schedules on suitability of specialized equipment | Provided | Provided | Provided | Did not Provide |

| Item | CRITERIA | BIDDERS | | | |
|------|--|------------------------|------------------------|------------------------|-----------------|
| | | 1. ACEG + CATIC | 2. BCEG + SINOHYDRO | 3. LARSEN & TUOBRO | 5. SIFIKI LE |
| 2 | Number of bids submitted by the Bidder | One | One | One | |
| 3 | General Completeness of the bid | Bid Complete | Bid Complete | Bid Complete | Did not Provide |
| 4 | Non Performance/Litigation history All pending litigation shall in total not represent more than <u>Thirty</u> percent (30%) of the Bidder's net worth and shall be treated as resolved against the Bidder. | None | None | None | Did not Provide |
| 5 | Partial Tender | Bid complete | Bid complete | Bid Complete | Bid Incomplete |
| 6 | Registration of bidders firms: All bidders (including JV Partners or member firms to a consortium) shall submit their Certificates of Incorporation or Registration | Provided | Provided | N/A | Did not Provide |
| 7 | Joint Ventures: Joint Ventures shall submit copies of their Joint Venture Agreement as per the bid requirements | Provided | Provided | N/A | Did not Provide |
| 8 | Signing of Bids; Bid shall be signed by the authorized person(s) of the bidder as per requirements of the bidding document | Signed | Signed | Signed | Did not Provide |
| 9 | Power of Attorney: Bid shall be signed by the authorized person(s) of the bidder as per requirements of the bidding document | Huang Hong You | Qin Cho | T Krishna | Did not Provide |
| 10 | Bid Validity | Contained in financial | Contained in financial | Contained in financial | Did not Provide |

| Item | CRITERIA | BIDDERS | | | |
|------|---|-----------------------------------|--|-----------------------------------|--|
| | | 1. ACEG + CATIC | 2. BCEG + SINOHYDRO | 3. LARSEN & TUOBRO | 5. SHIKI LE |
| 11 | Submission of Audited Accounts for the last five years | Provided | Provided | Provided | Did not Provide |
| 12 | The lead contractor shall meet Minimum average annual turnover of US\$200million or equivalent in other currencies within the last FIVE (5) years | Provided - Kshs. 174.40 Billion | Provided - USD. 2.74 Billion | Provided - USD. 6.318 Billion | Did not Provide |
| 13 | Deviations/Omissions/Reservations | None | None | None | |
| 14 | Minimum Key Personnel Requirement: CV's shall be provided for the Key personnel. | Provided | Provided | Provided | Did not Provide |
| - | | | | | |
| | Remarks | Qualifies for detailed evaluation | Does not qualify for detailed evaluation | Qualifies for detailed evaluation | Does not qualify for detailed evaluation |

Detailed Technical evaluation

The following 2 (two) firms listed in table 2 were found to have met the mandatory requirements and were therefore qualified for detailed examination:

Table 2- Qualified firms for detailed technical evaluation

| No. | Qualified Firm's Name | Nationality | Region |
|-----|-----------------------|-------------|--------|
| 1 | ACEG & CATIC JV | Chinese | Asia |
| 2 | Larsen & Tuobro | Indian | Asia |

The completeness of the two firms was checked in accordance with Clause 2.3.4 of the instruction to bidders and noted as detailed table 3:

Table 3 - Completeness to the requirements of the RFP

| | ACEG & CATIC | Larsen & Tuobro Ltd |
|------------------------------|------------------|---------------------|
| Authorized Representative | Mr. Huang Honyou | Mr. T . krishna |
| Initialing of Pages | Pages initialed | Not initialled |
| Previous Experience | Provided | Provided |
| Comments on TOR | Provided | Provided |
| Methodology & Work Plan | Provided | Provided |
| Proposed Staff | Provided | Provided |
| Signed CV's | CVs signed | CVs signed |
| Team Leader | Huang Hongyou | S Venkatesh |
| Completeness of Presentation | Complete | Complete |

Conclusion of the completeness check

There were no major omissions in the proposals and the evaluation committee accepted the two proposals for detailed evaluation.

Detailed Technical Evaluation and Rating

1) Building Form and Function:

- **Theme:** overriding theme in the entire design
- **Aesthetics:** Landmark building with Contemporary look & feel.
- **Style:** appropriate form and style taking into consideration local context

- **Function:** Efficient layout and spatial resolution to enhance passenger flows and processes

2) **Building Performance:**

- **Cooling and Ventilation System:** Meet/exceed requirements for comfort.
- **Energy management control system:** Meet/exceed requirement. Meet demands of complex control strategies for both artificial lighting and Air-conditioning.
- **Natural Lighting:** Meet the required day lighting levels and distribution

3) **Structural Design:**

- **Innovativeness:** How novel is the structural system?
- **Cost effectiveness:** is the structure cost effective?
- **Large Spanning Structures:** Few structural elements in occupied spaces

4) **Interior Design:**

- **Theme :** consistent with overall theme, form and style of terminal building
- **Aesthetics:** Effective use of desirable visual elements and creative use of internal finishes etc.

5) **Sustainable measures:**

- **Sustainable Measures:** Recycling, demolition waste, water conservation, recycled materials, etc.

- Indoor Air Quality: Control strategies for indoor air quality, low VOC materials, etc.
- Alternative Energy: Utilization of alternative energy technologies.
- General Compliance with LEED-NC 2009

6) **Bidder's Organization, Work Plan and Methodology:**

- Overview and understanding of the project
- Quality assurance in the Design
- Bidders overall organization to carry out and deliver the Works including organization of the firms and completeness of the management and site teams: a) Design and Construction Supervision, b) Construction works
- Methodology for carrying out the works: a) Design and Construction Supervision and b) Construction works
- Works program, task coverage and resources allocation in Design, Construction Supervision, Construction works
- Availability and mobilization plan of Construction equipment
- Quality management plan in Construction works and supervision of construction works
- Environmental management plan
- Testing, commissioning, training and operational readiness

7) **Bidder's previous experience in similar works:**

- Airport works with characteristics similar to the proposed passenger terminal complex Construction works

- Airport works with characteristics similar to the proposed passenger terminal complex Design and Construction Supervision Consultancy Services
- Urban mixed use commercial development with similar or above floor area Construction works
- Suitability of proposed specialized equipment in this bid shall be assessed the following:
 - 5
- For each of the above, provide name of manufacturer, ISO standard for the equipment, a letter of reference from a major hub airport home to a major carrier from any of the following alliances: Star Alliance, Sky Team and One World.
- Also, confirmation that a two year warranty shall be provided required

8) Bidder's Personnel Key Competencies:

- Educational & Professional Qualifications of Key Personnel
- Overall Experience
- Pertinent Experience
- Experience in the Region

Strength and Weaknesses of the Firm

After detailed technical evaluation, the following was noted as strengths and weaknesses of the seven firms.

i) M/S ACEG & CATIC JV

Strengths

- The firm is well established and has wide experience in similar assignments.

- The firm showed good understanding of the scope of consultancy services and construction works.
- The Theme Concept design was excellent
- The proposed methodology and approach was comprehensive
- Personnel proposed for the assignment have sufficient pertinent experience in similar works.

Weaknesses

- There presentation on Quality Assurance in Design was fair. The bidder concentrated their write up on quality assurance during construction.
- Some of the proposed personnel although had vast pertinent experience had little experience in the region.
- The bidder did not confirm the warranty period for the proposed specialized equipment

ii) M/S LARSEN & TUOBRO

Strengths

- The firm is well established. Has good specific experience related to the assignment.
- The bidder has demonstrated good understanding of the objectives of the assignment as detailed in organization approach and methodology.

Weaknesses

- Proposed personnel had very little experience in the region and some of them had no pertinent experience. Further the bidder's submission on details of tasks undertaken by proposed staff was poor as some of them were not detailed.
- The bidder had indicated that proposed personnel were in-house as the firm is multi-disciplinary, however the proposed staff for Airport Planner and Architect are not in-house employees. No details were provided to indicate where the personnel had been sourced from and the relationship with L & T was not clear.
- The bidder's quality management plan in construction works and supervision of construction works was poor. The bidder submitted a Quality Management Plan (QMP) for Abu Dhabi Airport instead of what they were proposing for JKIA, an indication of cut and paste.
- It was noted that most of the methodology submission by the bidder was generic rather than specific for the project.
- The bidder did not submit documentation on Seats in the submission for specialized equipment.

Results of the Detailed Technical Evaluation

The results of the detailed technical evaluation are as summarized in Table 3.4

Table 3.4: Summary of Technical Scores and Ranking

| BIDDER'S NAME | ACEG & CATIC | Larsen & Tuobro |
|---------------------------------------|---------------|-----------------|
| <i>Criteria</i> | <i>Scores</i> | <i>Scores</i> |
| Building Form and Function | 24.45 | 18.00 |
| Building Performance | 18.07 | 12.29 |
| Structural Design | 17.43 | 13.75 |
| Interior Design | 9.00 | 6.07 |
| Sustainable Measures | 17.70 | 12.14 |
| <i>Sub-total</i> | 86.86 | 62.21 |
| Total (Weighted against 45) | 39.09 | 28.00 |
| Organization, Work Plan & Methodology | 23.35 | 17.24 |
| Proposed staff | 23.52 | 17.50 |
| Total Score^a | 85.96 | 62.74 |
| Rank | 1 | 2 |

Table 3.5 gives a summary of the technical scores.

Table 3.5: Summary of Technical Scores

| | Concept design rating (Max 45) | Organization work plan and methodology (Max 28) | Bidders competence and key personnel (Max 27) | TOTAL SCORE (MAX 100) |
|---|--------------------------------|---|---|-----------------------|
| ACEG & CATIC JV WITH Pascall and Watson | 39.09 | 23.35 | 23.52 | 85.96 |

Recommendations of the Technical Evaluation

In accordance with the evaluation criteria, the qualifying score for further consideration in the evaluation is 70%.

It is therefore recommended that financial proposals for the following firm be opened and evaluated to conclude the evaluation and make recommendations for award.

- i) ACEG & CATIC JV in association with Pascal & Watson consultants, having scored 85.96.

FINANCIAL EVALUATION

Issues Faced During Evaluation

The Financial Proposal for the Technically Qualified Bid was publicly opened on 9th December 2011. There were no major issues faced during the evaluation, the exchange rate used for conversion of prices into common currency was the Central Bank of Kenya Rates applicable on 28th October 2011 a copy attached at Annex V (Miscellaneous Annexes).

The financial proposals were checked for completeness and responsiveness to the RFP requirements. Table F1 below summarizes the findings of the preliminary examination of the proposals.

Table F1-Completeness and responsiveness to the requirements of the RFP

| | ACEG + CATIC |
|------------------------------|--------------|
| Not more than 3 currencies | √ |
| Use of Standard Forms | √ |
| Original and Copy | √ |
| Completeness of Presentation | Complete |

Adjustment made to the prices

The financial proposal for the technically successful firm was checked for the following and adjustment made to the prices as noted here below:

- i) Arithmetic errors
- ii) Consistency between the Technical and Financial Proposals

Arithmetic Errors & Corrections Arising from Inconsistencies

There was one arithmetic error noted in the Financial Proposals as follows:

ACEG + CATIC- (Submitted - Kshs. 64,752,521.00)

The Financial Proposal contained one arithmetic error. On Page Nine of the BQ the bidder under the Collection for Electricals indicated a total of Kshs. 3,410,000,000.00 instead of the corrected sum Kshs. 3,403,788,100.00 thereby have a net effect of -ve 6,231,900.00 on the bid sum. Considering 10% Contingency and 5% Consultancy supervision Charges the overall effect of the error on the bid sum is -ve 7,166,685.00. The corrected bid sum is therefore Kshs. 64,745,354,315.00 against submitted Kshs. 64,752,521.00.

| Item No. | Description | Unit | Lump Sum Price (KSHS) Pre-Bid Estimate | Lump Sum Price (KSHS) Corrected ACEG + CATIC |
|--|--|------|--|--|
| | Construction Related Cost Collection | | | |
| 1 | General Costs | | 485,048,609.38 | 3,000,000,000.00 |
| 2 | Design Related Costs | | 11,017,779.70 | 2,800,000,000.00 |
| 3 | Architectural Works, Finishes, Furniture and Fitting | | 8,882,548,299.72 | 9,980,000,000.00 |
| 4 | Structural Costs | | 10,313,625,525.79 | 7,893,700,000.00 |
| 5 | Geotechnical costs | | 1,085,644,792.19 | 500,000,000.00 |
| 6 | Mechanical Costs | | 15,571,874,797.04 | 3,861,550,000.00 |
| 7 | Electrical Costs | | 5,200,058,144.40 | 3,403,768,100.00 |
| 8 | Utilities Costs | | 1,528,836,172.86 | 5,610,250,000.00 |
| 9 | Transportation Costs | | 3,346,751,053.32 | 10,370,000,000.00 |
| 10 | Dewatering and Ground Water Control | | 73,244,298.53 | 190,000,000.00 |
| 11 | Special Airport System | | 12,819,427,143.71 | 8,600,690,000.00 |
| 12 | DayWorks | | 77,594,600.00 | 90,350,000.00 |
| 13 | Subtotal | | 59,395,671,216.64 | 56,300,308,100.00 |
| 14 | Add 10% Contingency | | 5,939,567,121.66 | 5,630,030,810.00 |
| | Add 5% For Employer's Consultancy Supervision | | 2,969,783,560.83 | 2,815,015,405.00 |
| Grand Carried to Form of Tender | | | 68,305,021,899.13 | 64,745,354,315.00 |

Distribution of Bid Price.

- i) The Pre- Bid estimate for the works is Kshs. 68,305,021,899.13 including taxes.
- ii) A summary comparison of the Pre-Bid estimate and the financial bid including all taxes based on the Sectional Bill Totals is as tabulated below:

From Table F2, it is noted that the financial bid is -5.21% as compared to the pre-bid estimate. The bidder is within the margin of 25% of the pre-bid estimate.

No front loading was observed in terms of elemental comparison of bid prices with the pre-bid estimate, but it was noted that pricing for General Costs, Design Related Costs, Utilities Costs, Transportation Costs and Dewatering & Ground Water Control was high compared to the pre-bid estimate.

Proposal to Finance the Project

The bidder has submitted two Letters of Intent/Interest to Finance the Project from China Development Bank Corporation and China Exim Bank respectively. The Bidder has met the conditions set out in the Bid Document with respect to the Financing Proposal.

The scoring for the Financing Proposal was as indicated in Table F3.

Table 13: Scoring for the Financing Proposal

| No | Criteria | Points | Evaluators | | | | | | | Average |
|----|--|--------|------------|----|----|----|----|----|----|---------|
| | | | A | B | C | D | E | F | G | |
| 1 | <p>Terms of the Loan</p> <p>Tenderers shall propose the tenor of the loan including the repayment period and the grace period. KAA prefers a long term loan of at least 20 years, with a grace period of at least 5 years. - <i>Bidder gave the repayment period of between 20 -25 years with a grace period of 5 - 7 years</i></p> | 20 | | 20 | 15 | 20 | 20 | 10 | 20 | 19.17 |
| 2 | <p>Interest</p> <p>Tenderers shall indicate both fixed and floating interest rate options. The floating rate shall be based on a 6 month LIBOR plus/minus margin, if applicable. - <i>The bidder indicated a Fixed Interest of 2% - 6% and Floating Interest of 2% - 4 % with a commitment fee of 0.25% - 0.5%</i></p> | 20 | | 12 | 15 | 15 | 15 | 18 | 15 | 15 |
| 4 | <p>Security of the loan</p> <p>The secured obligations shall be secured by a pledge to receivables that are not encumbered to other loans. However, Tenderers can propose other forms of security or other forms of security arrangements provided that such arrangements are acceptable to KAA and will not result in material increase of cost to KAA. KAA does not offer its immovable assets as security. However, consideration can be made on providing the Greenfield Terminal as security.</p> | 20 | | 20 | 20 | 20 | 20 | 18 | 18 | 19.33 |

| | | | | | | | | | | |
|---|---|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|----|
| 5 | <p>Other charges arising from the facility</p> <p>Tenderers will be required; as part of the proposal, to quote any other charges that will be applicable to the facility. Other transaction costs on accounts to be maintained for the facility shall also be tabulated. Such cost may include ledger fees, prepayment penalties, commissions and others which may be specified in the proposal.</p> | 20 | | 20 | 20 | 20 | 20 | 20 | 20 | 20 |
| 6 | <p>Conditions Precedent</p> <p>Tenderers shall state or list the conditions that shall be fulfilled by KAA before a drawdown request is satisfied. If none, please indicate.</p> | 20 | | 20 | 20 | 20 | 20 | 20 | 20 | 20 |
| | <p>Currency of the Facility</p> <p>Bidders must indicate the currency of the facility. The financing is expected to be in United States of America dollars(USD) or a combination of Kshs and USD.</p> | Mandatory | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted | |
| | <p>Facility repayment intervals</p> <p>KAA intends to repay the loan in semi-annual installments of both principal and accrued interest over the term of the loan. Tenderers shall submit a schedule indicating the annual repayments for the principal and interest covering the full term of the loan. Tenderers can also indicate other favorable repayment intervals.</p> | Mandatory | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted | |

| | | | | | | | | | |
|--|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Availability of the Facility Bidders must confirm that funds are available, for drawdown, on signing of the contract for the construction of Greenfield terminal works Bidders must indicate preferred disbursement methods e.g Advance, reimbursement, direct payment etc. | Mandatory | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted |
| Mode of Operation Tenderers shall indicate the structure of operating the loan and repayment methods as applicable. | Mandatory | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted |
| Total Cost Summary Tenderers shall be required to prepare a summary of all possible cost to be incurred including interest cost but excluding proposed third party payment charges and indicate the effective borrowing cost per annum | Mandatory | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted | Submitted |
| TOTAL | 100 | | 92 | 90 | 95 | 95 | 96 | 93 | 93.50 |

NB - Total Score reduced to a weighting of 10%

The combined Technical and financial scores were as follows:

Table F 4 - Combined Technical and Financial Scores

| Bidders Names | Technical Evaluation | | | Financial Evaluation | | Financing Evaluation | | Combined Evaluation | |
|-----------------|---------------------------------------|--|----------------|---------------------------------------|--|--|--|--|------|
| | Technical scores ^a S(t) | Weighted scores S(t) x T ^b | Technical rank | Financial scores ^c S(f) | Weighted scores S(f) x F ^d | Financing scores ^a S(Fn) | Weighted scores ^e S(Fn) x F ^o | Scores S(t) 0.6T + S(f)0.3 F+ 0.1Fn | Rank |
| ACEG + CATIC | 85.96 | 51.58 | 1 | 30.00 | 30.00 | 94.00 | 9.40 | 90.98 | 1 |

Recommendations of the Evaluation Committee

From the foregoing the Evaluation Committee recommended that the Design/Build Tender for the Construction of the Greenfield Passenger Terminal Complex and Associated Works at JKIA be awarded to Anhui Construction Engineering Group Co. Ltd. (ACEG in Joint Venture with China National Aero-Technology International Engineering Corporation (CATIC) at the corrected Tender Sum of Kshs. 64,745,354,315.00 (Kenya Shillings Sixty Four Billion, Seven Hundred and Forty five Million, Three Hundred and Fifty Four Thousand Three Hundred and Fifteen only) including all taxes.

TENDER COMMITTEE DECISION

The Kenya Airports Authority Tender Committee at its Meeting No. 175 held on 15th December, 2011, under Minute No. 2, adjudicated the subject tender and approved award as per the recommendation of the Evaluation Committee. The Tender Committee further recommended the following:

1. Provision of cost estimate which should be competitive in comparison to similar projects in other countries.
2. Final contract be executed only after financial negotiations with the financier were concluded.
3. The award price be in US Dollars
4. Handling of all issues during negotiation of specific terms such as warranties on equipment and other associated terms.

The Successful Bidder was notified of the outcome of the tender via a letter dated 16th December, 2012.

In its meeting No. 06 of 27th July, 2012 (Special), the Tender Committee was informed of the resolution passed by the KAA Board of Directors in its meetings of 21st February, 2012 and 22nd May, 2012, respectively, to terminate the contract for the construction of the Greenfield Terminal Complex which had been awarded on 15th December, 2011 to M/s An Hui Construction Engineering Group Ltd and M/s China Aero-Technology International Engineering Corporation.

The Tender Committee considered the Board of Directors' resolutions and resolved that, due to the position taken by the Board of Directors, the continuation of this tender in its current form may not be tenable. Consequently, it recommended the termination of the tender.

There is no evidence that the decision to terminate the tender was communicated to the Applicant or reported to the Public Procurement Oversight Authority.

THE REVIEW

This Request for Review was lodged on the 31st day of July, 2012 against the purported decision by the Kenya Airports Authority made on the 26th day of July, 2012 in the matter of Tender No. KAA/ES/JKIA/658/DB for Design/Build Tender for construction of the Greenfield Passenger Terminal Complex and Associated Works at the Jomo Kenyatta International Airport.

The Applicant has raised 20 grounds as the basis for the review and seeks the following Orders:

- i) The Board annuls and/or quashes the purported resolution made by the Kenya Airports Authority on 26th July 2012 or any other resolution, act-or-decision-seeking-to-terminate the procurement process with respect to Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of The Greenfield Passenger Terminal Complex and Associated Works at Jomo Kenyatta International Airport.
- ii) The Board directs the Kenya Airports Authority to execute a Contract with the Applicant with respect to Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of The Greenfield Passenger Terminal Complex and Associated Works at Jomo Kenyatta International Airport forthwith.
- iii) The Board restrains the Kenya Airports Authority, its officers, servants and/or agents or any other person or office whatsoever from interfering with the procurement process in relation to Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of The Greenfield Passenger Terminal Complex and Associated Works at Jomo Kenyatta International Airport.

- iv) The Board restrains the Minister for Transport, the Permanent Secretary and the Ministry of Transport, its officers, servants and/or agents or any other person or office whatsoever from interfering with the procurement process in relation to Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of The Greenfield Passenger Terminal Complex and Associated Works at Jomo Kenyatta International Airport.
- v) The costs of this Request for Review be awarded to the Applicant.

PRELIMINARY OBJECTION

At the commencement of the hearing the Board noted that the Procuring Entity had filed three grounds of Preliminary Objection in the following terms:-

1. **Time limitation:** The request for review is time-barred as it is contrary to Regulation 73 (2) -(c) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Regulations") which stipulates that Request for Review under Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act") shall be made within fourteen (14) days of the notification under the Act.
2. **Lack of Request for Review Grounds statutorily required by Section 93 of the Act's threshold:** As drafted and presented to the Board, the request for review has no legal backing of Section 93 of the Act and the Regulations in so far as the *jurisdiction of the Board is concerned under the law*, in that:

- (i) The Request for Review has not presented any grounds on loss or damage suffered by the Applicant due to breach of the duty imposed on the Procuring Entity by the Act or the Regulations, for consideration by the Board. (*Section 93(1) of the Act*).
 - (ii) The appeal is frivolous, in that, there is neither oral nor written termination notice issued to the Applicant in respect of **Section 36** of the Act. Therefore, the Request for Review is completely contrary to the spirit of the Act and Regulations.
3. **Lack of merit for want of jurisdiction:** As this tender has been under investigation, the Request for Review is premature as the Review Board power's is only invited under section 106 in respect of review of the order of the Director-General made under section 105 of the Act

The Board noted that before the issues of the Preliminary Objection could be argued, the Applicant sought directions from the Board on the basis that the subject matter before it was also being investigated by the office of the Director General of PPOA as evidenced by the pleadings filed before the Board.

The Applicant further stated that it was aware the matter had also been discussed before Parliament and the Speaker of the National Assembly had directed three sub-committees dealing with Transport matters to investigate the matter and submit its report to the House on or before the 31st of August, 2012. It therefore sought to know from the Board the direction the instant matter would take in view of the cited matters.

On its part, the Procuring Entity stated that it had disclosed in its response to the Applicant's Request for Review that the matter was under investigation by the Director General of the Public Procurement Oversight Authority (POA) and they were still waiting for his report. It also confirmed that the matter was discussed in Parliament and the Speaker had directed investigations to be carried out touching on the matter.

The Board has considered the issues raised by the Applicant and the Response by the Procuring Entity and noted as follows:-

1. The subject tender is indeed a matter of investigation by the Director General of PPOA having been referred to his office by the Permanent Secretary Ministry of Transport.
2. The subject matter before the Board has also been the subject of discussion in Parliament in the recent past and is still being investigated by the relevant Parliamentary House Committees.

The Board is a live to the Provisions of Section 114 of the Act which provides as follows:-

"114. (1) No investigation shall be commenced or continued under this part, and no order shall be made under this part, in relation to an issue that the Review Board is reviewing or has reviewed under Part VII.

(2) Subsection (1) ceases to apply if, after the Review Board has completed its review, information comes to the attention of the Director-General that was not brought before the Review Board in the course of its review.

In view of the foregoing provisions, the Board therefore holds that the Request for Review as filed is properly before it for determination

irrespective of investigations by other independent bodies. Therefore, the Board hereby directs that the matter before it will proceed to hearing within its mandate under Section 93 of the Act which provides as follows;

“(1) Subject to the provisions of this part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.

(2) The following matters shall not be subject to the review under Section (1)-

- a. The choice of a procurement-procedure-pursuant-to-part IV;*
- b. A decision by the procuring entity under Section 36 to reject all tenders, proposals or quotations;*
- c. Where a contract is signed in accordance to section 68; and*
- d. Where an appeal is frivolous.*

The Procuring Entity argued that the Board lacked jurisdiction to entertain the instant application because it was not premised on the provision of Regulation 73 of the Act.

It added that Regulation 73 to the Act also excluded the Board from entertaining matters that were not made within 14 days of the occurrence of the alleged breach complained of, or of the notification of the award.

It submitted that the Request for Review as filed by the Applicant lacked the legal backing of Section 93 of the Act and Regulations thereto in so far as jurisdiction of the Board is concerned as there was no cited breach of the provisions of the Act nor any written or oral communication of the termination notice issued to the Applicant.

On the issue of the Preliminary Objection, the Procuring Entity submitted as follows:-

- 1) **Time limitation:** The Request for Review is time-barred as it is contrary to Regulation 73 (2)-(c) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Regulations") which stipulates that a Request for Review under the Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Act") shall be made within fourteen (14) days of the notification under the Act.

- 2) **Lack of Request for Review Grounds statutorily required by section 93 of the Act's Threshold:** As drafted and presented to the Board, the Request for Review has no legal backing of Section 93 of the Act and the Regulations in so far as the *jurisdiction of the Board is concerned under the law*, in that:
 - (i) The Request for Review has not presented any grounds on loss or damage suffered by the Applicant due to breach of the duty imposed on the Procuring Entity by the Act or the Regulations, for consideration by the Board. (*Section 93(1) of the Act*).
 - (ii) The appeal is frivolous, in that, there is neither oral nor written termination notice issued to the Applicant in respect of **Section 36** of the Act. Therefore, the Request for Review is completely contrary to the spirit of the Act and Regulations.

- 3) **Lack of merit for want of jurisdiction:** As this tender has been under investigation, the Request for Review is premature as the Review Board's power is only invited under Section 106 in respect of review of the order of the Director-General made under Section 105 of the Act.

Finally, it argued that the Request for Review as filed was therefore premature and the same should have been filed in another jurisdiction as envisaged under Section 99 of the Act.

In response, the Applicant stated that the objection as filed was not a preliminary objection based on law as it touched on issues of fact relating to the notification of the award of tender.

It argued that the Procuring Entity's reference to the provisions of Sections 67 and 83 was misplaced as the same had no relevance to the application as filed. It added that the application as filed was not based on non-notification of the award of tender. It submitted that the application is challenging the purported nullification of the award by an entity that did not have the legal mandate so to do.

It further submitted that its Request for Review was premised on Section 93 of the Act which section empowers the Board to deal with all matters filed before it as envisaged by the said section.

It argued that the notification of the award created legal obligations that were binding in law and the Board was duty bound to ensure compliance of such obligations within the parameters of the law.

It stated that termination of an award by the Procuring Entity under Section 36 of the Act could not be effected after the notification of the award and acceptance of the same.

It referred the Board to a High Court Decision in *H.C.C.C. No. 1260 of 2007 inter Selex Sistemi Integrati* in which the High Court held that:

"In our present case the purported termination was done after award of Tenders was communicated as confirmed by both the applicants and

the interested party, and even the 2nd Respondent. This cannot be a situation covered by the ouster clause under Section 36 (1) of the Act. It is my finding and decision that the ouster clause under Section 36 (1) of the Act does not apply to the present case as the tender was already awarded. There is no subsequent event from parties other than the procuring entity that actuated the proceedings. I therefore hold that both the 1st Respondent and this court has jurisdiction to consider and review the decision of the 2nd Respondent, the procuring entity, to terminate the awarded Tender”.

It stated that the Board had a duty to ensure that the Procuring Entity acted within the provisions of Section 2 of the Act which clearly stipulates the objectives of the Act.

It further referred the Board to its wide powers as envisaged at Section 98 of the Act which empowers the Board to carry out its mandate in ensuring compliance with the Act and the Regulations thereto.

Finally, it submitted that Article 227 of the Kenya Constitution 2010 supported its cause as it required a procurement process that was fair, transparent and competitive among other things. In that regard, it argued that the Constitution enjoined the Procuring Entity to comply with the legal provisions of the Law especially in matters of integrity and transparency.

With regard to the time limitation, the Applicant argued that although it was notified of the award of tender vide the Procuring Entity's letter of 16th December, 2011 nothing had happened within 14 days from the said date of the notification to warrant it moving the Board. It stated that on the 26th of July, 2012, it became aware that the Board of Directors of the Procuring Entity “purported” to annul and/or cancel the award of tender made to it.

It added that it moved the Public Procurement Administrative Review Board within four days of learning of the move by the said Board of Directors. Therefore, it maintained that the time bar did not arise as it had exercised its right of review under Section 93 of the Act and not Regulation 73 as argued by the Procuring Entity. It therefore prayed to the Board to overrule the objection to pave way for the hearing of the Application on merit.

In reply, the Procuring Entity informed the Board that the award of the tender was neither terminated nor annulled as alleged by the Applicant. It further stated that in fact, it had entered into negotiations with the financiers appointed by the Applicant (being the Successful Bidder) and is indeed in the process of negotiating the terms of the contract with the appropriate parties.

The Board has carefully considered the submissions of the parties and the documents that were submitted before it and makes the following findings.

On the issue of Jurisdiction, the Board notes that Sections 68 and 93 of the Act provide as follows:-

Section 68:-

- 1) *"The person submitting the successful tender and the procuring entity shall enter into written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under Section 63.*
- 2) *The written contract shall be entered into within the period specified in the notification under section 67 (1) but not until at least fourteen days have elapsed following the giving of that notification.*
- 3) *No contract is formed between the persons submitting the successful tender and the procuring entity until the written contract is entered into"*

Section 93:-

- 1) *"Subject to provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a Procuring entity by this Act or the Regulations, may seek administrative review as in such manner as may be prescribed.*
- 2) *The following matters shall not be subject to the review under subsection (1)-*
 - (a)The choice of a procurement procedure pursuant to Part IV;*
 - (b)A decision by the Procuring Entity under Section 36 to reject all tenders, proposals or quotations;*
 - (c)Where a contract is signed in accordance to section 68; and*
 - (d)Where an appeal is frivolous"*

The Board notes that although the Procuring Entity awarded the Applicant the tender vide its notification letter of 16th December, 2011, it has not executed the **contract** in terms of the provisions of Section 68(2) of the Act. The Board further notes that although the notification letter issued to the Applicant did not specify the time within which the contract would be signed, the same stated as follows:-

"The contract shall be signed by the parties after successful negotiations and signing of a loan agreement with the financiers and submission of the performance guarantee".

Pursuant to the foregoing, the Procuring Entity has confirmed to the Board that the negotiations alluded to in the aforementioned letter are underway with the relevant parties and in fact there has not been any annulment and/or termination of the tender award as alleged by the Applicant.

Therefore, the Board finds that the issue of whether or not there has been annulment or termination of the tender before signing of the contract is a

matter that falls within the jurisdiction of the Board. This decision is guided by the holding in the case of *Republic-vs.- P.P.A.R.B, H.C.C.C. No. 1260 of 2007* already cited above.

On the issue of time bar, the Board notes that the Applicant lodged its Application for Review premised on the Provisions of Section 93 of the Act and not Regulation 73 as alleged by the Procuring Entity.

The Board further notes that the Application as filed by the Applicant does not fall under those matters itemized at Section 93(2) of the Act as set out above. In these premises, the Board finds that the objection based on limitation of time would have been sustained if the application had been lodged pursuant to the provisions of Regulations 73 to the Act which regulation envisages appeals by unsuccessful bidders.

Accordingly, all the limbs of the Preliminary Objection fail.

In view of the above holding, the Board orders that the Request for Review as filed proceed to hearing on merits.

When this matter came up for hearing on 21st August 2012, the Applicant's advocate on record, Mr. Issa, was unable to attend on grounds of ill health as attested to by a letter from his doctor to that effect, and accordingly, through Mr. Nganga Mbugua, who was holding brief for him, informed the Board that he had been instructed by Mr. Issa to move the Board for adjournment.

Upon hearing the motion for adjournment, the Board granted the application and directed the parties as follows:

1. That the Applicant should inform the Board when the matter comes up for hearing on 22nd August 2012, as to from where, and how, it obtained the documents annexed to its pleadings as exhibits.

2. That the Procuring Entity should inform the Board as to the status of the implementation of the project, which is the subject of this Application.

The reason for the request by the Board to Applicant to furnish it with information as to the source of the documents referred to above was that, upon careful consideration of the nature of the documents, the Board had formed the impression that they appeared not to have been procedurally obtained in accordance with Section 44 of the Act and accordingly, might not therefore, prima facie, properly be before the Board.

Pursuant to the direction by the Board, the Applicant filed with the Board an affidavit sworn by one I Zheng Yi, dated 21st August, 2012, setting out the sources of the exhibits annexed to the Applicant's pleadings. On its part the Procuring Entity availed to the Board a document dated 21st August, 2012, and headed "**Implementation of Jomo Kenyatta International Airport Expansion Public Procurement Administrative Review Board Brief by Kenya Airport Authority**", herein referred to as the "Brief", which sets out in detail the genesis of the project and its current status.

When the matter resumed for hearing on 22nd August, 2012, the Procuring Entity informed the Board that it wished to raise a Preliminary Objection based on its pleadings, according to which it sought the directions of the Board on the issue, and upon there being no objection by the Applicant to the motion, the Board directed the parties to proceed to argue the Preliminary Objection.

On its part, the Applicant sought direction of the Board regarding information obtained from the Hansard Report of the proceedings in Parliament on 16th August, 2012, according to which, the Minister for

Transport had informed the Parliament that the Director General of the Public Procurement Oversight Authority had commenced investigations.

Accordingly, the parties proceeded to argue these issues as preliminary matters. As set out in the ruling herein above, the Board found that the Preliminary Objection was without merit and, accordingly, directed that the matter should be heard on its merit.

Following this ruling, the parties proceeded to argue the case on its merits as directed by the Board.

On the question of the source of the documents attached as exhibits to the Applicant's pleadings, the Applicant stated that the documents were placed under its doors by an unknown party as indicated in the affidavit sworn by I Zheng Yi. It argued that in any event, the documents were now in the public domain by reason of the fact that, according to the Hansard Report of the Parliamentary proceedings on 16th August, they were tabled before the House and admitted. The Applicant further argued that insofar as the public procurement process is of public nature and is conducted in the public interest, all documents and information generated through the process are of public interest and are thus subject to access by the public in accordance with Article 35(1)(a) of the Constitution of Kenya 2010 which states that:

*"Every citizen has the right to access to
(a) information held by the State; and..."*

The Applicant submitted that in light of this provision of the Constitution, and the fact that the Procuring Entity had not denied the authenticity of the documents, they should be admitted.

While admitting the fact that there may be situations where production of documents may not be permissible because of the public interest, the Applicant stated that it was incumbent upon the court to weigh the public interest against the need to ensure that administration of justice was not frustrated by withholding documents which must be produced in evidence in order for justice to be done. It argued that in weighing the public interest and the harm that might be done to it by the production of documents, against the interest of ensuring that justice is done by the production of documents which are claimed to touch on the public interest, the Court, or the Board, as the case may be, must look at those documents. In support of this contention, the Applicant cited the case of *Baseline Architects Ltd & 2 Others Vs. National Hospital Insurance Fund Board Management* [2008] eKLR, in which the court stated at page 2 that:

"In any event the nature of the harm (to the public interest) would need to be clearly examined and I think it is wrong to adopt a procedure which would restrict and/or prevent a judge from making an independent evaluation of the issues before him for determination. All in all it is desirable that a judge should have all the relevant materials before him, in order for him to limit/delimit the boundaries of what is eligible for production by a party. In my view the fact that the production of the document in a particular litigation prejudices to a party's case or assist the other side is no such plain overruling principle of public interest. It is for that reason that judicial officers are expected to examine the documents in order to test the injury to the state would not result due to disclosure."

The Applicant argued that although in the *Baseline* case cited above the judge found that the documents could not be produced, the distinction

between that case and this application were twofold. First, in the *Baseline* case, the documents sought to be produced were not produced at the time of the arbitration and, accordingly, it was not open to the party seeking to produce the said documents subsequently to do so. Secondly, the said documents were marked "confidential" and it would be inappropriate to admit such documents without compromising the principle of advocate/client privilege.

It further distinguished the instant case and that of *Baseline* on the ground that whereas arbitration proceedings are private, procurement proceedings, by virtue of the fact that they entail use of public funds, are public, and accordingly, the Board is entitled to have access to records of their proceedings.

The Applicant further cited the case of *Conway Vs. Rimmer and Another [All England Law Reports, 1968]*, in which the issue of the clash between the public interest that no harm shall be done to the public interest or to the nation by disclosure of certain documents, and the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done, was discussed by the House of Lords. It argued that this case supported its claim that the documents under consideration did not touch on the public interest, and should therefore be admitted as their non admission would frustrate the administration of justice.

Regarding the provisions of Section 44 of the Act, the Applicant argued that those provisions were no longer applicable in view of Article 35 of the Constitution which now makes it clear that information held by the State is accessible to a citizen. It further argued that, in any event, Section 44 of the

Act applies where it is for the purpose of a review under Part VII, which was the situation in this case. The Procuring Entity further submitted that it was clear under Section 44 that disclosure of information is only prohibited under two circumstances, namely, where:

1. such disclosure would impede law enforcement; and
2. such disclosure would not be in the public interest.

In its view, these two tests were not met in this case. It stated that moreover, according to the section, prohibition against disclosure applied only where the information is given by an employee or agent of the procuring entity or member of a board or committee of the procuring entity, which was not the case here, as the documents were submitted to the Applicant by some unknown person, who slipped the documents under the Applicant's door, and not by any of those specified in the Section.

In response, the Procuring Entity opposed the admission of the documents annexed to the Applicant's pleadings stating that they had been obtained unprocedurally. It argued that the Applicant was under duty to comply with Section 27(4) of the Act, which requires contractors, suppliers and consultants to comply with the Act and regulations, and that by obtaining the documents under review other than as permitted under Section 44 of the Act, it had breached the statutory duty imposed on it by Section 27(4) of the Act. It stated that if the Applicant wanted to know what was going on, nothing would have been easier than for it to write to the Procuring Entity to seek information. It submitted that by obtaining the documents in the manner in which it had done, the Applicant demeaned the objectives of the Act as set out in Sections 2(c) and (d) of the Act.

As to reference to Article 35 of the Constitution by the Applicant, the Procuring Entity stated that the exercise of the Article must be done in an open manner. It stated that it was not proper that a bidder should be in possession of information, such as the Applicant had, unless such information was obtained through the proper channels, as set out in the Act. It further stated that it has always been the practice of the Procuring Entity to respond to inquiries raised by bidders, and that if the Applicant had sought information in the proper way, such information would have been availed to it.

In conclusion, the Procuring Entity stated that it had compiled the status report as requested by the Board and was prepared to present it. It further stated that it had presented the same information in the status report to Parliament.

The Board has carefully considered the submissions by the parties and the documents presented before it and makes the following findings and decision.

The issue of the propriety of admitting these documents was raised by the Board on the first day of the proceedings when it realised that the documents appeared to have been obtained irregularly. The reason for concern by the Board as to the source of the documents is based on the well-established principle of equity, which states that "*he who comes before the court of equity must do so with clean hands.*" Accordingly, therefore, the Board felt that it was important that at the very outset it was necessary that the Applicant should enlighten the Board as to how the documents, which prima facie, seemed to be the property of the Procuring Entity, came into its possession before a determination could be made as to their admissibility.

The thrust of the Applicant's argument in support of the admission of the documents can be summarised as follows:

1. The documents were in the public domain in light of the fact that they had been tabled in Parliament on 16th August, 2012 during the proceedings in the House when the subject procurement was debated therein.
2. Article 35 of the Constitution allows citizens access to information held by the State, notwithstanding the provisions of Section 44 of the Act, and that in any event, Section 44 only restricts disclosure of information where the information is disclosed by employees or agent of the procuring entity or a member of a board or committee of the procuring entity, where such disclosure would impede law enforcement; or would not be in the public interest.
3. That in deciding as to whether a document should be disclosed in the course of judicial proceedings, the court or a tribunal, should consider on the one hand, the public interest that might be harmed by disclosing a document, and on the other, the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

It is a notorious fact that this tender has been the subject of intense media coverage in the last few weeks in which the contents of the subject documents have been widely quoted, sometime verbatim. It is not clear where the media obtained the documents from, but what is certain is that, in one way or another they must have obtained them from some source. The question which arises is, what is the source of these documents? As will be seen subsequently in this decision, these documents have been circulating in various Government Ministries among which, there has been a raging and

bitter debate as to whether the tender was properly awarded, virtually since the decision was made by the Procuring Entity to award the tender to the Applicant in December 2011. It could well be the case that whoever made them available to the media might have obtained them from any of these Ministries. It is also possible that the source of the leakage could be the Procuring Entity itself where, as will be seen subsequently in this decision, there have been equally serious internal divisions on the award of the tender.

In a situation like this, it is difficult to determine where a breach of security may have occurred which led to these documents floating all over the place. On its part, the Applicant has sworn an affidavit deponing that the documents were slipped under its door by some unidentified person who thought that the Applicant might be interested in them. Given the fact that the tender has generated serious division among the people who are supposed to guard the confidentiality of government transactions, it is entirely possible that the documents fell into the hands of the Applicant from among these sources.

It is a matter of procurement law of this country that the procurement process should be confidential, primarily in order to safeguard the confidentiality of the business information which is made available to a Procuring Entity for the purpose of evaluating tenders. In this process, each bidder opens its heart to the Procuring Entity, as it must, and avails to it information which it would not in the normal course of events disclose to anyone else, in order to maintain its competitive advantage. It is this need for confidentiality which Section 44 of the Act seeks to safeguard, and to that end, enjoins the Procuring Entity to not disclose any information, except in respect to situations set forth in the Section.

In this case, the Procuring Entity appears to have been lax with its records, partly due to the infighting within the organisation, and it is this that may have contributed to the documents falling into the hands of the Applicant. In short it is the Procuring Entity that must be blamed for failure to safeguard its own documents.

Furthermore, as stated hereinbefore, the matter has been the subject of debate in Parliament at which the documents were tabled and their contents discussed. It is not clear where the documents tabled in Parliament came from. Accordingly, the documents having been tabled in Parliament, the Board takes judicial notice of the fact that the documents are in the public domain.

On the issue as to whether or not disclosure of these documents touch on the public interest, having read the said documents, the Board finds that their contents do not affect the public interest so as to justify their non-disclosure.

Taking the above facts into account the Board directs that the documents be admitted.

Regarding its prayer number one, namely that the Board should annul and/or quash the purported resolution made by the Board of Directors of the Procuring Entity on 26th July 2012 or any other resolution, act or decision seeking to terminate the procurement process with respect to the tender in question, the Applicant submitted that in light of the statement by the Procuring Entity during the hearing of the motion on Preliminary Objection that there was no annulment of the procurement process and that the process was still on-going, the Board should make a finding that notification of award of tender issued on 16th December 2011, was still valid.

There is no dispute about the fact, following evaluation of the tenders by the Evaluation Committee of the Procuring Entity, the Applicant emerged the winner. The evaluation was carried out in three stages, namely, the preliminary evaluation stage; the technical evaluation stage; and the financial evaluation stage. Consequent upon this, the Applicant was notified vide a letter dated 16th December, 2012, that its bid was successful. The last paragraph of the said letter states that "*The contract shall be signed by the parties after successful negotiations and signing of a loan agreement with the financiers and submission of the performance guarantee.*" It responded to the said letter by dating, and signing the letter on 19th December 2011, as instructed, and returned the same to the Procuring Entity. Further, subsequent to this, the Applicant by a letter dated 19th December 2011 accepted the offer. These facts have not been disputed by the Procuring Entity, nor has it taken any steps to withdraw the letter. Indeed, the Procuring Entity stated during the hearing that, it had not terminated the tender proceedings which gave rise to the letter of award, and that, pursuant to the paragraph of the letter quoted above, it was still negotiating with the Applicant. If it is still negotiating with the Applicant, it can only do so based on the letter of offer, and this act is, in the view of the Board, a tacit acknowledgment by the Procuring Entity that the letter of award is still valid.

It is clear to the Board that based on the above, the Procuring Entity regards the letter of award as still subsisting. Accordingly, the Board finds that the notification of award dated 16th December 2011 is still valid.

Regarding its prayer number 2 that the Board should direct the Kenya Airports Authority, the Procuring Entity, to execute a Contract with the Applicant, the Applicant stated that the contract was in two parts, namely, the Design and Build aspect, and the Financing Contract. It further stated

that, as far as the Design and Build Contract is concerned, there was nothing further to negotiate as the prices and the design had been agreed upon, a fact which had not been controverted by the Procuring Entity, and that if there was goodwill on the part of the Procuring Entity, the contract should have been signed. The Applicant argued that notwithstanding the statement in the letter of notification that the execution of the contract was to be done upon conclusion of negotiation, Section 68(2) of the Act must be construed to mean that the signing of the contract must take place within a reasonable period. It averred that if it was the position of the Procuring Entity that the whole negotiation process has not been concluded, and thus the contract cannot be signed, then the fault lies with the Procuring Entity as the Applicant had supplied all the information needed to enable the negotiations to be concluded.

It argued that Section 68(2) of the Act, which provides that the contract shall be entered into within the period specified in the notification under Section 67(1), must be construed to be a reasonable period. It argued that in any event, Clause 3.28.5 of the Request for Proposals specified that "*The parties to the contract shall have it signed within 30 days from the date of notification of the contract award unless there is an administrative review request*", which period had long lapsed.

In conclusion, the Applicant submitted that since there was no dispute regarding the Design and Build Contract, the Board should order the Procuring Entity to formalise the Contract with the Applicant based on its powers under Section 98(b) of the Act. It further urged the Board that in exercise of this power it should set the time limit within which the parties should sign the contract.

In response to the Applicant's prayer number 2, the Procuring Entity stated that in terms of Sections 84 and 85 of the Act, negotiations were allowed and that there was no certainty as to which way they will go. It argued that given this fact the Board could not compel the parties to enter into a contract as claimed by the Applicant as entering into a contract required a meeting of the minds. It further argued that given the fact that the Procuring Entity is under a line Ministry, which must be consulted in the entire process; the fact that there are other parties which are involved in the process of negotiation; the fact that even within the structure of the Procuring Entity there must be internal consensus; and the fact that even the Cabinet is seized of the matter; it would not be practical to implement an order to enter into a contract, and to do so within a specified timeline, as argued by the Applicant. The Procuring Entity further submitted that in any event, the award to the Applicant was based on preliminary designs, and that negotiations involving all stakeholders were still needed for the final designs to be agreed upon.

In reply, the Applicant submitted that there were no negotiations contemplated as the award had been made to it following the evaluation of its proposal by the Procuring Entity. Regarding the statement by the Procuring Entity that it was carrying out the process through internal consultations, the Applicant stated that based on the Brief on the status of the project presented by the Procuring Entity, it was clear that there were actors involved who are not contemplated in the Act, who had interfered with the process. It urged the Board to shield the process from such interference, which was the basis for its prayers numbers 3 and 4.

As to Article 35 of the Constitution, the Applicant averred that access to information as set out in that Article did not require that a party seeking such information should write a letter in order to obtain it.

Regarding the assertion by the Procuring Entity that there had to be a meeting of the minds on the Design and Build Contract, the Applicant reiterated its claim that there were two separate contracts. In its view, the Design and Build Contract was awarded to it following evaluation in which it emerged the winner, and therefore there was nothing to negotiate.

As regards the Financing Contract, the Applicant stated that as early as 11th January, 2012, the China Development Bank, which was the proposed financier of the project, sent the financing terms and conditions to the Procuring Entity, and that the terms were never rejected. It stated that it had not been informed by the Procuring Entity about any difficulties it was facing in accepting these terms and conditions and that in fact there had been no indication from the Procuring Entity that it had been in touch with the proposed financier regarding the terms and conditions of the Finance Contract. It further stated that as far as it was aware, the funds were available from the proposed financier. It submitted that the correspondence contained in the brief submitted to the Board by the Procuring Entity suggest that failure to conclude the Financing Contract had nothing to do with negotiations. The Applicant stated that it had never received any communication from the Procuring Entity as to why negotiations between the Procuring Entity and the financier were not proceeding since January 2012 after submitting the name and the terms and conditions of the proposed financier.

In conclusion, it urged the Board to grant its prayers as set out in its pleadings.

The Board has carefully considered the submissions by the parties and the document presented before it and makes the following findings and observations.

The Board notes as follows:

1. That this Request for Review is unique in the annals of procurement disputes that have been referred to the Board for adjudication, in that for the first time, the complaint is filed by the successful bidder, and not by a losing bidder.
2. That the project arose from the recommendations of a consultant who was engaged by the Kenya Airports Authority in 2008 to review the Authority's master plan in keeping with ICAO requirement.
3. That the review took into account in particular the business development strategy of Kenya Airways up to the year 2020, and projected traffic by other players at the airport through to the year 2030.
4. That on the basis of traffic projections, a decision was made to the proposed Greenfield Terminal Complex, which is the subject of the tender that led to the dispute under review.
5. That on 9th March 2011, the Board of Directors of the Authority (KAA) met after a meeting with the Minister for Transport and approved the Project.
6. That following this decision by the Board of Directors of the Authority, the Authority advertised an international tender for the project in newspapers

on 22nd and 23rd June 2011, as well as on its website, by which it requested interested bidders to submit proposals for the implementation of the project.

7. That the tender notice required the bidders to, among other things, provide a financier who would engage KAA directly. The tender documents provided the minimum terms for the financing agreement and the deadline for submission of proposals was 21st September, 2011.

8. That this deadline was extended to 25th October and further to 17th November, 2011, at the request of some bidders.

9. That following this advertisement, 120 prospective bidders collected the Request for Proposals (RFP) documents, but only five bidders returned the RFP document, duly completed.

10. That this was a two envelope bid according to which, bidders submitted separate envelopes for their Technical Proposals, and Financial Proposals, respectively.

11. That on 14th November 2011, the Permanent Secretary in the Office of the Prime Minister wrote to the Permanent Secretary, Ministry of Transport pointing out that *"the project as currently structured does require mobilization of massive resources with approval of various arms of government....and that therefore recommend that the on-going procurement process to stop immediately and that you commence the mechanism of seeking Cabinet approval of the same by way of a Cabinet Memorandum."* The letter was copied to the Head of Public Service, the Permanent Secretary, Ministry of Finance and the Managing Director, KAA.

12. That the evaluation committee established by the Procuring Entity conducted the evaluation of the proposals in three evaluation stages, namely, preliminary, technical and financial using evaluation criteria set out in the RFPs. The Board further notes that arising out of this exercise only two bidders proceeded to the technical evaluation stage.

13. That on 14th November 2012, the Permanent Secretary in the Office of the Prime Minister wrote to the Managing Director of KAA requesting for a brief on the status of the project and suggesting that Cabinet approval be obtained before the matter proceeds. The letter was received by KAA on 18th November, which was the day of closing/opening of the RFPs.

14. That on 21st November, 2011, the Procuring Entity responded to the letter from the Office of the Prime Minister seeking permission to continue with the evaluation of the tenders and subsequently paid a courtesy call on the Prime Minister who granted permission to the Authority to continue with the evaluation of the tenders.

15. That on evaluating the technical proposals, only one bidder, the Applicant in these proceedings, moved to the financial evaluation stage, and upon the evaluation of its financial proposal, was considered responsive and consequently awarded the tender at the tender sum of US 653,782,814.57.

16. That the letter of notification of the award was dated 16th December, 2011 and informed the Applicant at paragraphs 2, 3 and 4, respectively as follows:

"By copy of this letter you are required to make arrangements with your proposed financier(s) for commencement of negotiations directly

with the Authority which shall not be earlier than fourteen (14) days from the date of this letter.

The contract shall be signed by the parties after successful negotiations and signing of a loan agreement with the financiers and submission of the performance guarantee.

Please sign and return a copy of this letter to signify your acceptance of this award."

17. That the Applicant through its authorised representative signed the letter on 19th December 2011, and returned it to the Procuring Entity.

18. That by a letter dated 19th December 2011, the Applicant wrote to the Procuring Entity informing it that: *"We will make arrangements with our proposed financiers for commencement of negotiations with the Authority."*

19. That on 10th January 2012, the Permanent Secretary, Ministry of Transport wrote to the Managing Director, KAA stating among other things, that *"Following consultation on this matter with the Honourable Minister for Transport, I have been directed to advise you to prepare a brief to the Cabinet on the progress of Development of Greenfield Terminal at JKIA so that the Hon. Minister may present the same to the Cabinet. You will recall that the Office of the Prime Minister requested for a brief on this project vide letter Ref.OPM1.INF/89/259 dated 14th November, 2011.*

I have further been directed to advise you that as the outcome of the bidding process has clearly not produced an acceptable minimum number of acceptable Technical and Financial Proposals that could be compared and

that since none of the bidders has offered to provide finance, the process should be undertaken on the basis of design, construction cost and completion time, etc, and financing should be an added advantage (perhaps through supply credit), as KAA would end up signing a separate financing agreement with a suitable financier."

20. That on 11th January 2012, China Development Bank, the proposed financiers, wrote to the Authority submitting a Term Sheet entitled "*Indicative Terms and Conditions, US\$546,000,00 Term Loan Facility For Kenya Airport Authority*". The Term Sheet states that "*Please note that the terms set out in the term sheet are indicative only and do not constitute an offer to arrange or finance the Facility.*" The proposed loan to KAA and is to be guaranteed by the Government of Kenya.

21. That on 20th January 2012, upon receiving complaints, the Ethics and Anti-Corruption Commission collected documents on the project from KAA offices and commenced investigations on the complaints.

22. That on 8th February 2012, the Managing Director of KAA replied to the letter from the Permanent Secretary, Ministry of Transport, stating, inter alia, as follows:

"Five (5) bidders were evaluated, two (2) of which were knocked off after preliminary evaluation. The other three (3) were subjected to technical evaluation, of which two (2) did not attain pass mark to advance to financial bid opening. As per the procurement law, the most responsive bidder in technical evaluation who attained the required pass mark was subjected to financial evaluation.

This bid was then adjudicated and awarded by the Tender Committee in accordance with the prevailing law. All bidders were appropriately informed of the outcome. In the absence of any appeal from any bidder, we have proceeded to negotiate financing so that works can commence on time. KAA is committed to start construction works by August.

The tender documents did not require the bidder to have capability to finance the project by themselves as stated in the above letter. This tender was evaluated as a Design & Build basis. The requirement was for the bidders to source for a financier with whom the Authority would negotiate and sign a financing agreement.

Currently, KAA is negotiating financing with the financiers, namely China Development Bank and China Exim Bank, who had been proposed by the Successful Bidder. Upon conclusion of the negotiations, KAA will sign an agreement with the financier who offers the best terms."

23. That on 10th February 2012, the Permanent Secretary, Ministry of Transport responded to the letter from the Managing Director, KAA, cited immediately above stating, inter alia, "*...considering the magnitude of financial resources expected to be expended in the project, the Honourable Minister for Transport has directed me to instruct you not to commit the Kenya Airport Authority on any contractual arrangement on this proposed project until the issues raised by the office of The Prime Minister and this Ministry are resolved by the Cabinet as requested by the Office of the Prime Minister's letter Ref. OPM1/INE/89 dated 14th November, 2011 and as advised and requested in our letter Ref.MOT/AT/24/2 Vol.V/81 dated 10th January, 2012.*"

24. That on 14th February, 2012, the Managing Director, KAA, wrote to the Hon. Attorney-General, seeking the Attorney-General's opinion on the issues raised in the letter from the Permanent Secretary dated 10th January, 2012, cited above.

25. That on 15th February, 22, 2102, the Ethics and Anti-Corruption Authority wrote to KAA clearing the tender process and allowing KAA to proceed with the project.

26. That on 21st February 2012, the Board of Directors of KAA met and resolved that *"KAA should annul the ongoing procurement process and re-start the same afresh."* One Member dissented stating, among other things, that *"..it is preferable to wait for the legal opinion earlier sought by Management from the Attorney-General and recommended by external counsel be received first."*

27. That on 22nd February 2012, the Attorney-General responded to the letter from the Managing Director of KAA, giving his opinion as requested vide the letter dated 14th March, 2012. In his legal opinion, the Hon Attorney-General considered the following legal issues and advised as follows:

1. **Whether the bidding process produced an acceptable minimum number of technical and financial proposals.**

The procedures to be followed in relation to open tendering are set out in Parts V and IV of the Act and the Public Procurement and Disposal Regulation of 2006, respectively.

It is noteworthy that none of the provisions in the Act and the Regulations specifies the minimum number of technical and financial proposals to be evaluated. The requirement for competition can only be inferred from the use of terms such as, "comparison of tenders", "ranking", and "lowest evaluated price."

An attempt to set a minimum number of bids to be evaluated is made in the PPDGM. Part (o) of section 7.2 (Open Tendering Method) states that:

"Where only one or two bids are determined responsive the procuring entity shall have the option of proceeding with the evaluation or determining the entire tender non-responsive."

In the instant tender, five firms submitted bids. One firm was disqualified. The remaining four firms were subjected to a three-step evaluation process. The first step was the preliminary evaluation and the four firms were subjected thereto after which two firms failed to meet the minimum mandatory requirements. Thus, only two firms proceeded to the second step, being technical evaluation. One firm was found unresponsive as a result of which only one firm proceeded to the third step - financial.

2. "Whether the bidders offered to provide finance."

We have already indicated that the eligibility criteria for the instant tender required the bidders to:

- (a) Submit a letter of commitment to finance the project from a financier(s); and
- (b) Source for a suitable financier(s) meeting the minimum terms and conditions in the tender document.

In this regard, the Successful Bidder submitted two letters of intent/interest to finance the project from China Development Bank Corp & China Exim Bank, respectively.

The fact that the two letters were submitted is sufficient proof that the Successful Bidder had sourced for the two financiers.

3. The directive to terminate the procurement proceedings and retender.

The Attorney-General advised that termination of procurement proceedings was permissible under Section 36 without entering into a contract, and that the procedure was that the bidders must promptly be notified. However, in this case Clause 3.27.2 of the request for proposals restricted the Employer to annul the tender process to *"any time prior to award of contract."*

The other situations where termination was permissible under:

1. Under Section 65 where the notification to all bidders that their bids were unresponsive implies termination; and
2. Where only one or two bids are determined responsive and the Procuring Entity has stated in the bidding documents that it shall opt to determine the entire tender process non-responsive, as per the PPDGM.

The Honourable Attorney-General advised that the implied annulment under Section 65 did not apply as there was a responsive bid, and that, option 2 did not apply as it was not expressly stated in the bidding documents.

The Honourable Attorney-General concluded by advising the Procuring Entity that:

"Thus, by seeking to terminate the procurement process after notification and acceptance of award of contract, the Authority will not only be contravening the provisions of Clause 3.27. 3 of the Request for Proposals but also acting in bad faith: thereby undermining the integrity and fairness of the procurement process."

28. That in short, the Honourable Attorney-General advised that:

- a) In opening one financial proposal, the process produced a Successful Bidder in accordance with the Public Procurement and Disposal Act and the Public Procurement and Disposal Regulations.
- b) It was clear the bidders were not required to finance the project but were only to propose a financier(s) to KAA.
- c) Terminating the procurement proceedings will undermine the integrity and fairness of the procurement process.

29. That on 6th March, 2012, the Permanent Secretary, Office of the Prime Minister wrote to the Managing Director, KAA stating that:

"The purpose of this communication is to inform you that the matter has been forwarded for guidance by the Infrastructure Committee of Cabinet during its meeting scheduled to be held on 14th March 2012. In this regard, you are requested to submit a Cabinet brief for discussion during the meeting. Consequently, you are advised to withhold any further action on the existing procurement process until a policy direction is given by the Infrastructure Committee of the Cabinet.

By a copy of this letter, Permanent Secretaries are requested to brief their respective Ministers."

30. That on 7th March 2102, the Managing Director, KAA replied to the letter by the Permanent Secretary, Office of the Prime Minister attaching the requested Cabinet brief and confirming that further action on the procurement will be withheld pending direction on the matter.

31. That on 20th March, 2012, the PS, Office of the Prime Minister wrote to the MD of KAA requesting that document relating to the tender process be sent to a Mr. Kasuku of the Prime Minister's Office. The documents were delivered.

32. That on 20th March, 2012, the PS, Office of the Prime Minister, wrote to the Hon. Attorney-General requesting further analysis of the legal implications of terminating the procurement process.

That on 16th April 2012, the Hon. Attorney-General replied to the letter by the PS dated 20th March, 2012, whereby he reiterated his opinion dated 22nd February and further stating, among other things, that:

1. *Since the exchange of an offer{by the Procuring Entity and the Applicant} gives rise to a binding legal relationship, it noteworthy signing of a contract is an act of formalizing the contract - that is, as a solemn record of an already complete and binding agreement between the parties.*
2. *Having noted the rights of the successful bidder have already crystallised and that a binding legal relation exists between the parties, the successful bidder is entitled to certain rights under the contract, such as damages and specific performance.*
3. *In view of the fact that the investigations by the EACC did not disclose any irregularity in the instant procurement process so as to warrant delay in*

implementing the project, we are of the opinion that the project should be implemented, as tendered.

4. Termination will prompt the Successful Bidder to enforce its rights under the contract in the form of claims for specific performance.

33. That on 22nd of May 2012 the Board of Directors of KAA met and reaffirmed its resolution passed on 22nd February, 2012, that the procurement process for the Greenfield Terminal project be annulled and thereafter it be restarted afresh.

34. That on 14th June 2012, the PS, Ministry of Transport wrote to the Director General, Public Procurement Oversight Authority, requesting him to carry out investigation into the procurement process of the project.

35. That on 25th June, 2012, the Minister for Transport called a meeting with PS Ministry of Transport, KAA, Kenya Civil Aviation Authority, and Kenya Airways to discuss the way forward in implementing the project. At the meeting KQ was directed to engage a consultant to review the Greenfield design and make necessary recommendations. Further, the Minister informed the meeting that he was appointing a steering committee to oversee the project.

36. That on 10th July, 2012, the consultant appointed by KQ M/S Avia Solutions, UK held a kick off meeting with KAA, KCAA, and KQ.

37. That on 26th July, 2012, the Board of Directors of KAA held a special meeting at which they passed a resolution directed the Managing Director to cancel the award.

38. That on 26th July 2012 the Managing Director of KAA wrote to the Attorney-General requesting for legal direction on cancellation of the award.

39. That on 27th July, 2012, Acting Head of Public Service, Mr. Francis Kimemia wrote a letter to the Hon. Attorney-General regarding the resolution of the Board of KAA passed on 26th July, 2012, stating among other things, that:

"The Resolution seeks to direct the Managing Director, the Kenya Airports Authority to terminate the process and award of a Vision 2030 Contract, a matter which the Cabinet is already seized of and indeed directed the appropriate Cabinet Committee to resolve the outstanding issues and give feedback to the Cabinet.

In my opinion, it is in bad taste and disrespectful to Cabinet to attempt to compel the Managing Director to undertake such action behind the Cabinet Committee and the Cabinet itself. The Board should give time to the Minister for Transport to appraise the Cabinet and thereafter the Cabinet in its next meeting.

I am rather concerned because the this advice was given to the Permanent Secretary, Ministry of Transport personally in a meeting held on 24th July, 2012 at the Office of the President."

The letter was copied to: The PS, Office of the Prime Minister; the PS, Ministry of Finance; the PS, Ministry of Transport; the Chairman, KAA; and the Managing Director, KAA.

40. That on 27th July, 2012, the Tender Committee of KAA held an urgent meeting on the direction of the Board of Directors to cancel the tender, and observed that the implementation of the project was untenable and recommended termination of the tender.

41. That on 31st July, 2012, the Managing Director of KAA wrote to the Tender Committee advising that he was still awaiting direction of the Cabinet.

42. That on 6th August 2012, the consultant hired by KQ presented its review report to the Minister for Transport.

43. That on 13th August, 2102, the PS, Office of the Prime Minister wrote to the Acting Secretary to the Cabinet and the Head of the Civil Service, stating his objection to the Board instruction to the Managing Director to cancel the procurement process when it was pending before the Cabinet.

44. That on 16th August, 2012, the matter came up for debate in Parliament at the end of which the Speaker directed that it be referred for investigation to the joint committees on Transport, Public Works and Housing, Budget and Finance, Planning and Trade. The Speaker further directed that the Joint committee should file its report in the House "within the next 14 days."

45. That on 23rd August, 2012, according to media reports, the Board of Directors of KAA met and resolved to send the Managing Director on forced leave.

The Board has found it necessary to set out this detailed account of the chronology of events surrounding this matter for the following three reasons which constitute the Applicant's principal prayers:

1. To determine whether the Procuring Entity should be ordered to conclude the contract resulting from the award of the tender to the Applicant.
2. To determine whether there is/or has been interference by officers, servants and/or agents or any other person or officer in Kenya Airports Authority, in the procurement process in the tender under consideration, and if so, for the Board to restraint them from such interference.
3. To determine whether there is/or has been interference by the Minister for Transport, the Permanent Secretary and the Ministry of Transport, its officers, servants and/or agents or any other office whatsoever in the procurement process and to restrain them from interfering with the procurement process.

Dealing first with the prayer that the Board should order the Procuring Entity to execute a contract with the Applicant in respect to the tender in question, it is important to recall the ruling which the Board has made herein regarding the status of the letter of award dated 16th December 2011. The Board has ruled that, insofar as the Procuring Entity has not revoked the letter of award, the letter remains valid.

The Board has noted that the letter of notification of award required the Applicant to signify its acceptance of the award by signing the letter itself, which it did. This act by the Applicant constituted acceptance by it of the award which the Procuring Entity made to the Applicant as communicated by the letter. The consequence of this acceptance is that a legal relationship was formed between the parties which gave rise to certain mutual rights and obligations between them, which remained inchoate, pending the formalisation of the contract. Thus though a contract in a formal sense was not in place, it nevertheless existed in a legal sense, arising from the award by the Procuring Entity and acceptance of the award by the Applicant. The fact that such a legal relationship existed can be gleaned from Section 57(3) of the Act which provides that:

"Tender security shall be forfeited if the person submitting the tender -

(a).....

(b).....

(c) refuses to enter into a written contract as required under Section 68 or fails to furnish any required performance security."

It is evident from this section that upon awarding a contract to a successful bidder a procuring entity acquires the right to cash in the tender security, although there is no written contract between itself and the successful bidder, based on the legal relationship accruing from the offer by the procuring entity.

The Board notes the rider at the last paragraph in the letter of award quoted herein before which states that "The contract shall be signed by the parties after successful negotiations and the signing of a loan agreement with the

financiers and submission of the performance guarantee." The Procuring Entity has relied on this rider to argue that the letter of award is subject to successful negotiations of the Design and Build contract, which is the contract under review. It is apparent from the documents made available to the Board that no attempts whatsoever have been made by the Procuring Entity to carry out any negotiations, notwithstanding the fact that eight months have elapsed since it issued the letter of award. In fact it is clear from these documents, including the documents attached as exhibits by the Applicant that the Procuring Entity has no intention of carrying out such negotiations. Indeed, the Procuring Entity has been ordered by its Board of Directors to annul the proceedings. The Board therefore, does not accept the claim made by the Procuring Entity during the proceedings that negotiations are on-going.

The Board further notes Clause 3.28.5 of the RFP which states that:

"The parties to the contract shall have it signed within 30 days from the date of notification of contract award unless there is an administrative review request."

There is no evidence that there was any request for review following the notification of award, and consequently there is no reason why the contract should not have been concluded within the specified period. As already stated above, the Procuring Entity has not taken any steps to bring to fruition any negotiations, if at all there was any basis for negotiations as claimed by the Procuring Entity, notwithstanding the paragraph of the letter of award cited above, and the provisions of Clause 3.26.6 Step 2(d) paragraph 3, which states that **"Kenya Airport Authority shall negotiate and sign an agreement with the best evaluated bidder."** Indeed, this would be strange in light of the

fact Section IV of the Tender Documents, the Technical Proposal consisted of, among other things, Specifications, Drawings, and the financial proposals to include Bills of Quantities, implying that these would have formed the basis for quantification of the value of the tender submitted by the Applicant, thereby contradicting the claim that there was something of a technical or financial nature left to be negotiated before the contract could be signed.

The Board notes the legal advice which has been given by the Attorney-General as set forth hereinbefore in which he points out the fact, among other things, that as a result of the acceptance by the Applicant of the offer made to it by the Procuring Entity, legal rights had accrued which would entitle the Applicant to take legal action against the Procuring Entity. The Board concurs with this advice.

The question has arisen as to what power is vested on the Board to grant the prayer requested by the Applicant to the effect that the Procuring should be compelled to sign the contract. In his submission, the Applicant has pointed to Section 98(b) of the Act as the authority on which the Board should anchor its order.

The Section states that:-

"Upon completing a review the Board may do any one of the following--

(a).....

(b) give directions to the procuring entity with respect to anything to be done or redone."

The Board is satisfied that it has power to issue the order prayed for under this Section of the Act. The next question for consideration is what time limit

should the Board set within which the contract should be signed. The Applicant has argued that such time should be reasonable. On its part, the Procuring Entity has argued against such an order, pointing out that there are many internal as well as external stakeholders to be consulted and that such an order would be difficult to implement.

As to the reasonable time the Board is of the view that Clause 3.28.5 of the Tender Document cited above provides a barometer by which to measure reasonableness in the instant case. The said clause provided for signing of the contract to be 30 days from the date of notification of the award. The Board notes that the notification of award was made on 16th December 2011.

Taking the above matters into account the Board invokes its powers under Section 98(b) of the Act and orders the Procuring Entity to execute the contract for Design and Build with the Applicant within 30 days of this decision. This is so because the Procuring Entity confirmed to the Board that the question of finances was not an issue because they had budgeted for the project, and was not obliged to sign a finance contract with any financier proposed by the bidder.

Turning to the order prayed for by the Applicant that the Board restrains the Kenya Airports Authority, its officers, servants and/or agents or any other person or office whatsoever from interfering with the procurement process in relation to **Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of The Greenfield Passenger Terminal Complex and Associated Works at the Jomo Kenyatta International Airport forthwith**, the Board notes that the orders given by the Board of Directors raises a fundamental question as to the power exercisable by the board of a state corporation in matters of public procurement in Kenya. In this respect it is

necessary to look at the structures put in place by the procurement system in Kenya, as delineated by the Public Procurement and Disposal Act, 2006.

Parts II and III of the Act are relevant in this connection.

Part II, which is headed "**BODIES INVOLVED IN THE REGULATION OF PUBLIC PROCUREMENT**", establishes the Public Procurement Oversight Authority as a body corporate. Section 9 of the Act sets out the functions of the Authority, which in summary are of regulatory and oversight nature over the procurement system. In this respect, it is the apex body in Kenya's procurement system. Section 10 establishes the office of the Director-General as the Chief Executive of the Authority.

Section 21 establishes **the Public Procurement Oversight Advisory Board**. The functions of the Advisory Board are spelt out in Section 23 of the Act and can be summarised as to advise the Authority generally on the exercise of its functions.

Section 25 of the Act establishes **the Public Procurement Administrative Review Board** with the sole function of reviewing complaints by bidders who are aggrieved by the decision of a procuring entity. The orders it can give at the conclusion of a review are set out in Section 98 of the Act.

These bodies are not involved in the operational aspects of procurement. The bodies that are empowered by the law deal with the operational aspects of procurement are set out **under PART III of the Act**. Section 26 of the Act establishes a tender committee and a procurement unit within each public entity, and authorises the establishment of "*such other bodies as are required under the regulations for the purpose of making such decisions on behalf of a public entity.*" The bodies established by the Regulations pursuant to Section

26 are Evaluation Committees as per Regulation 16. They are ad hoc committees appointed by the Accounting Officer in each public entity.

The composition of the Tender committees is specified in the Second Schedule of the Regulations.

An examination of these structures indicates that they are staffed solely by staff of public entities. This is not a matter of accident. The Board notes that a review of the history of Kenya's procurement system indicates that up until 2001 when the Exchequer and Audit Act (Public Procurement Regulations, 2001) took effect decision-making in the procurement process included board members of statutory corporation, and other actors, such as Cabinet Ministers. The decision to remove board members, the Cabinet Ministers and others from playing a role in decision making in procurement was aimed at removing interference by said persons in the procurement function, and to fix responsibility for decision in matters of procurement on professional staff of a public entity. To this end Section 27 of the Act puts responsibility for compliance with Act on the Accounting Officer and employees of a public entity.

Based on this brief analysis of the structures established by the Procurement Law of Kenya, and the rationale for the establishment of these structures, it is clear to the Board that the boards of statutory corporations have no place in the decision-making process in our procurement system. Responsibility for decision making is exclusively left to functionaries in a public entity, meaning that they are accountable for their decisions to all oversight bodies such as the Auditor-General, the Ethics and Anti-Corruption Authority, the Director-General of the Public Procurement Oversight Authority, and Parliament.

Taking the above matters into account, the Board finds that the decisions by the Board of Directors of Kenya Airports Authority, directing the Managing Director to terminate the tender proceedings has no basis in our procurement law as the Board of Directors of a statutory corporation has no such powers. The Board further finds that in any event, such a directive cannot be executed after the award has been made relying on the power conferred on a procuring entity under Section 36 of the Act, in light of the decision by the High Court in the case of *Selex Sistemi Integrati vs Public Procurement Administrative Review Board and Kenya Civil Aviation Authority* [HCCC No.1260 of 2007]. In that case, the learned judge stated that:

"In our present case the purported termination was done after award of the Tenders was communicated as confirmed by the both the Applicants and the interested party, and even the 2nd respondent. This cannot be a situation covered by the ouster clause under Section 36(1) of the Act. It is my finding and decision that the ouster clause under Section 36(1) of the Act does not apply to the present case as the tender was already awarded. There is no subsequent event from parties other than the Procuring Entity that actuated the proceedings."

In short, the court in the *Systemi* case laid down the principle that termination of a procurement proceeding is not available to a procuring entity once an award has been made and communicated. Accordingly the purported termination of the procurement proceedings as directed by the Board of Directors would not be implementable in this case.

As to whether the Review Board can direct the Kenya Airports Authority, its officers, servants and/or agents or any other person or office whatsoever from interfering with the procurement under consideration, the Board is of the view that having pointed out hereinabove that the Board of Directors of a

statutory corporation has no role to play in the procurement process, it is up to the Board of Directors of KAA to appreciate the limitation imposed on it and to act in accordance with the law.

Turning to the prayer by the Applicant that the restrains the Minister for Transport, the Permanent Secretary, and the Ministry of Transport, its officer, servants and/or agents or any other person or office whatsoever from interfering with the procurement process in relation to Tender No. KAA/ES/JKIA/658/DB Design/Build Tender for Construction of the Greenfield Passenger Terminal Complex and Associated Works at the Jomo Kenyatta International Airport, the Board notes the correspondence emanating from the Ministry of Transport and other government agencies set out in this decision. These agencies include; the Office of the Prime Minister, the Office of the President, Parliament and the Board of Directors of Kenya Airports Authority.

It is clear from the many letters cited above and the statement by the Minister for Transport in Parliament on 16th August, 2012 that there is interference in the procurement process by government agencies that are not recognised by the Public Procurement and Disposal Act, 2005, in terms of decision making process in procurement.

In this regard, the Board notes the correspondence exchanged between the Office of the President, the Office of the Prime Minister, the Ministry of Transport, the Attorney-General, the Ethics and Anti-Corruption Authority, the Director-General of the Public Procurement Oversight Authority and the Managing Director of Kenya Airports Authority and the debate in Parliament on 16th August, 2012.

The only issue of concern to the Board is whether or not, as implied in the prayer by the Applicant under consideration, the actions by the Minister for Transport and the Permanent Secretary, Ministry for Transport, violate the provisions of the Public Procurement and Disposal Act, so as to justify the grant of the prayer by the Applicant that they should be restrained from interfering with the procurement process.

Reading the letters emanating from the Permanent Secretary and the statement by the Minister in Parliament, it is clear that they want the award annulled, and the process repeated, on the ground as stated in the letter by the Permanent Secretary dated 10th January, 2012, that the outcome did not *"produce an acceptable minimum number of acceptable Technical and Financial Proposals that could be compare and that since none of the bidders has offered to provide finance, the process should be undertaken on the basis of design and build only."*

As already stated in this decision in connection with the Applicant's prayer that the Board should restrain the Board of Directors of KAA from interfering with the procurement process, the Procurement Law of Kenya is structured in such a manner as to recognise only certain actors in the decision process that leads to an award. As also already stated, the rationale for structuring the system in this manner was to remove the decisions from external interference as was the case before the promulgation of the 2001 Regulations, and to ensure that those who make decisions are accountable to the various oversight bodies for their actions.

It is clear to the Board that in our procurement system, all the government agencies mentioned herein before have no role to play in the decision making process in a procurement. It is also clear to the Board that the Permanent

Secretary has no role to play in the decision of another Procuring Entity, notwithstanding the fact that the entity in question is under the line ministry over which he has superintendence. His role in decision making is limited only to procurements which are under his ministry in his capacity as the Accounting Officer in the Ministry, as set forth in Section 27 of the Act.

In view of the above, the Board finds that the directions issued by the various government agencies listed above directing the Kenya Airport Authority to annul/or stop the procurement proceedings, and to start the process over, acted without authority under the Public Procurement Act of 2005. As stated previously in this decision, such directives could in any event, not be implemented, having regard to the High Court decision in the Sistemi case.

As stated in this decision in respect to the prayer by the Applicant that the Board should restrain the Board of Directors of KAA from interfering with the procurement process, the Board declines to grant the prayer to restrain the Minister, and the Permanent Secretary, from interfering with the procurement process, but directs them to comply with the law.

Regarding the Financing Contract, the Board makes no finding on the matter as the Applicant is not a party to the proposed contract.

Taking all the above matters into account, the Board orders pursuant to Section 98(b) of the Act that the Procuring Entity signs the Contract for Design/Build with the Applicant within twenty eight (28) days of this decision as provided for by Clause 2.28.5 of the Request for Proposals.

The Board makes no orders as to costs.

OBSERVATIONS BY THE BOARD

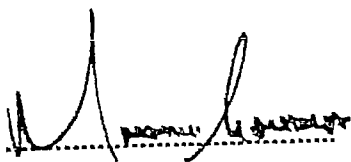
The Board observes that this Tender was awarded on December 16th 2011 following an evaluation process which led to the award of the tender to the Applicant as indicated above. The Board further observes that conclusion of the process through execution of the contract has been delayed such that, nearly nine months since the decision by the Procurement Entity, the project has not commenced.

The Board further observes that the procurement process has been widely criticized for being too bureaucratic and slow in delivering projects, especially infrastructure projects, to Kenyans in pursuit of Vision 2030.

The Board observes that very often, it is the kind of interference evident in this matter that is responsible for the delays in procurement processes, yet blame is shifted to the institutions involved in the procurement process and the law.

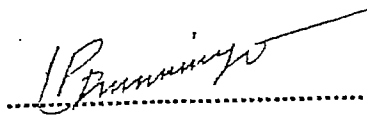
It is clear from the events set out in this case that the delay in concluding the procurement process was precipitated by interference by the agencies listed above and not the Board or the law itself.

Dated at Nairobi on the 29th Day of August, 2012.



CHAIRMAN

PPARB



FOR: SECRETARY

PPARB

FILE SUMMARY: DEVELOPMENT OF GREENFIELD TERMINAL AT JOMO KENYATTA INTERNATIONAL AIRPORT

1. 24th June, 2011, the Kenya Airports Authority advertised the tender for the JKIA Greenfield Project in the local newspapers and on the KAA website. *Folio AA*
2. The tender was advertised on 24th June, 2011 and was due to close on 21st September, 2011. However, due to the volume of queries from the bidders, the closing period was extended from 21st September, 2011 to 25th October, 2011. This was further extended to 17th November, 2011.
3. One hundred and twenty (120) tender documents were purchased. Five (5) bidders returned the documents. Two (2) of the Five (5) bids were incomplete and were disqualified. One of the two was a bank that only submitted a financial proposal, while the other entity only submitted a technical proposal. Of the three (3) remaining bids, two (2) were technically non-responsive. The remaining bidder was technically evaluated and their financial proposal opened. The bidder did not have the capacity to finance the project and had proposed two financing entities.
4. 16th December, 2011, a Notification of Award was sent to Anhui Construction Engineering in Joint Venture with China Aero-Technology International Engineering Corporation. The bidder responded affirmatively on 19th December, 2011. *Folio AA*
5. 10th January, 2012, the Permanent Secretary (PS) Ministry of Transport directed the Managing Director of KAA to:
 - a. Prepare a cabinet brief on the progress of Development of the JKIA Greenfield Project. The PS stated that a request for the brief had been made earlier by the Office of the Prime Minister (OPM) on 14th November, 2011;

- b. Issue a new tender that would be assessed on the basis of design, construct, cost and completion time etc, as none of the bidders had offered to provide finance. The financing aspect would be left to KAA.

Folio AB

6. 8th February, 2012, KAA responded to the Permanent Secretary Ministry of Transport stating that the tender process was carried out in a satisfactory manner. *Folio A*
7. 14th February, 2012, KAA sought legal advice from the Office of the Attorney General on the matter. KAA stated that the PS Ministry of Transport vide his letter of 10th January, 2012 had directed that the award be cancelled and the tendering process be repeated. KAA sought legal advice on how to proceed in light of the fact that the award letter had already been issued to the winning bidder. *Folio A*
8. 22nd February, 2012, the Attorney General provided a legal opinion on the matter and advised that KAA had carried out the procurement process in accordance to the law and could not terminate the process. *Folio C*
9. 24th February, 2012, KAA submitted a cabinet brief on the Development of the Greenfield Terminal at JKIA to the PS, Ministry of Transport. *Folio D*
10. 20th March, 2012, OPM wrote to the Attorney General and stated that the cabinet memo on the Development of the Greenfield Terminal at JKIA had been presented and discussed during the second Cabinet Committee meeting on Infrastructure. The Cabinet Committee deferred the forwarding of the memo and directed that a sub-committee of itself be constituted to advise the Committee within one week on
 - a. The tendering process for the project and the legal implications of terminating the process.
 - b. Propose the way forward for the project "

Folio E

11. 20th March, 2012, OPM wrote to the Attorney General informing the office on the establishment of the special committee to deal with the matter. The letter also stated that the meeting for the technical committee was to be held on 21st March, 2012 while the meeting for the Ministers was to be held on 22nd March, 2012.

Folio F

12. 27th March, 2012, KAA wrote to OPM and copied the Attorney General forwarding the following documents:
 - a. JKIA Greenfield Terminal Project summary;
 - b. Correspondence with various government offices, OPM, Ministry of Transport, Ministry of Finance, State Law Office and Ethics and Anti – Corruption Commission

Folio 2

13. 30th March, 2012, OPM wrote to the Attorney General informing the office on the meetings of the technical committee and the ministers' committee were to be held on 3rd April, 2012. *Folio 1*

14. 12th April, 2012, OPM wrote to the Attorney General forwarding documents and the report of the technical committee on the matter. *Folio 6*

15. 16th April, 2012, the Attorney General forwarded a legal opinion (the second one on the issue), to OPM. The opinion concluded that the project be implemented as tendered as the procurement process had been carried out properly from a legal standpoint. *Folio 7*

16. 19th April, 2012, OPM wrote to the Attorney General as part of the Ministers Committee communicating that a meeting was to be held on 25th April, 2012. *Folio 8* (This meeting was postponed).

17. 30th April, 2012, OPM wrote to the Attorney General as part of the Ministers Committee communicating that a meeting was to be held on 2nd May, 2012.
18. 10th May, 2012, the Minister for Transport wrote to the Attorney General stating that the Ministry disagreed with the legal opinions rendered by the Attorney General. The Minister concluded the letter by communicating that since the matter was before the Public Procurement Oversight Authority (PPOA), a report from PPOA would form a competent basis for a more comprehensive legal opinion. *Folio 9* (This letter was received by the Attorney General on 21st May, 2012)
19. 24th May, 2012, the Attorney General responded to the letter from the Minister of Transport dated 10th May, 2012 and received on 21st May, 2012. The Attorney General noted the content of the letter and stated that the office would await further communication on the issue from the Minister for Transport or the Chairman of the Cabinet Sub – Committee. *Folio 10*
20. 4th June, 2012, KAA wrote to the PS Ministry of Transport notifying the PS that the Board of Directors in a meeting on 22nd May, 2012, made a decision that the procurement process relating to this matter should be annulled, and a fresh tendering process be commenced thereafter. The letter was copied to the Attorney General. *Folio 11*
21. 15th June, 2012, the Attorney General sent a response to KAA noting the content of its letter dated 15th June, 2012. *Folio 13*
22. 26th July, 2012, KAA wrote to the Attorney General seeking direction on the following issues:
 - a. The cancellation of the tender in view of the legal opinions rendered to KAA by the Attorney General;

- b. The directions from ~~Office~~ of the Prime Minister to halt the procurement process pending a directive on the matter from Cabinet;
- c. The clearance of the procurement process by the Ethics and Anti-Corruption Commission

23. 27th July, 2012, the PS/Secretary to the Cabinet wrote to the Attorney General. The subject matter of the letter was the resolution by the KAA Board to terminate the procurement process in this matter, without the concurrence of the Cabinet Committee. The PS stated that the action was in bad taste and disrespectful to the Cabinet. *Folio 14*

24. 27th July, 2012, the Attorney General responded to the PS/Secretary to the Cabinet stating that since the matter was pending for deliberation before the Cabinet, it would be imprudent to initiate a parallel process as this could potentially create conflicting outcomes which could expose the Government and KAA to legal liability. *Folio 15*

25. 13th August, 2012, the PS OPM wrote to the PS/Secretary to the Cabinet in reference to the letter from KAA dated 26th July, 2012. The PS OPM concurred with the views of the PS/Secretary to the Cabinet and the Attorney General that as the Cabinet was seized of the matter, the action by the KAA Board amounted to contempt. The PS OPM stated that it was the view of the OPM that the Ministry of Transport should strongly reprimand the KAA Board for its breach of administrative protocol and that KAA rescind the decision to cancel the award of the contract while awaiting the final policy direction by the Cabinet. *Folio 16*

26. 16th August, 2012, a letter from the PS/Secretary to the Cabinet copied to the Attorney General informed of a meeting on this matter to be held on 29th August, 2012. *Folio 18*

27.24th August, 2012, the Managing Director of KAA wrote to the Chairman Board of Directors of KAA on the issue of his compulsory leave as ordered by the Board of Directors on 23rd August, 2012. By copy of the letter, the Managing Director KAA sought legal advice on the issue from the Attorney General. *Folio 22*

28.27th August, 2012, the Chairman, Board of Directors KAA wrote to the Attorney General on the issue of the compulsory leave of the Managing Director as ordered by the Board of Directors on 23rd August, 2012. The conclusion of his letter stated that the Board of Directors of the KAA was not able to work with the Managing Director as he persistently and continuously failed to implement KAA Board decisions/resolutions. *Folio 23*

May 24, 2012

Hon. Amos Kimunya, EGH, MP
Minister for Transport
P.O. Box 52692-00200
NAIROBI

Dear

RE: LEGAL OPINION ON THE TENDER FOR THE DEVELOPMENT OF
THE GREENFIELD TERMINAL AT JOMO KENYATTA
INTERNATIONAL AIRPORT

We acknowledge receipt of your letter on the above-captioned matter Ref. No. MOT.C/AT/24/2 VOL. V/ (146) dated 10th May, 2012, whose contents are duly noted.

In particular, we note that the Public Procurement Oversight Authority (PPOA) has been requested to review the matter as provided for under Section 102 of the Public Procurement and Disposal Act, 2005 (PPDA) with a view to investigating the instant procurement proceedings so as to determine whether there has been a breach of the PPDA; and that the Cabinet at its meeting of 17th May 2012 directed the Cabinet Committee on Infrastructure to consider and finalize the matter.

We await further communication from you or the Chairman of the Cabinet Sub-Committee as may be deemed necessary.

Yours


GITHU MUIGAI,
ATTORNEY GENERAL

C.C. Hon. Chris Obure, E.G.H., M.P.
Minister for Public Works



**MINISTRY OF TRANSPORT
OFFICE OF THE MINISTER**

Telegrams: "TRANSCOMS" Nairobi
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Email: ps@transport.go.ke

MOT/C/AT/24/2 VOL.V/(146)



NGONG ROAD
P. O. Box 52692-00200
NAIROBI, KENYA

10th May, 2012

Hon. Prof. Githu Muigai, FCI Arb, MP

Attorney General
Attorney General's Chambers
P.O. Box 40112
NAIROBI

Dear *Prof*

**LEGAL OPINION ON THE TENDER FOR THE DEVELOPMENT
OF THE GREENFIELD TERMINAL AT JOMO KENYATTA
INTERNATIONAL AIRPORT**

I refer to the Third Cabinet Committee on Infrastructure meeting held on 2nd May, 2012, in which the Cabinet Committee advised that further discussions be held between the Minister for Transport and the Attorney General on the Legal Opinion provided for the Greenfield Terminal project procurement process.

We acknowledge the Attorney General's Legal Opinion as provided, as it was based on the information availed at that time and on what you were asked to do. The issues surrounding the Greenfield Terminal project are, however, much broader in perspective and revolve not only around the procurement process but also on value for taxpayers money. For example the Special Audit of the procurement process by the Inspectorate of State Corporations as requested for by the Office of the Prime Minister recommended that

—Transport for Prosperity—

*Draft response
e-mailed to Hon
A-G on 23/5/12.*

the ongoing procurement process be terminated and a fresh tendering process be undertaken.

A) Review of the procurement process for the tender for the Greenfield Terminal project.

We note that your Legal Opinion was based mainly on the Ethics and Anti-Corruption Commission's (EACC) investigations of alleged irregularities in award of tender for the Greenfield Terminal. The results of the Ethics and Anti-Corruption Commission's preliminary investigations did not return any findings to warrant the delay in the implementation of the project. However, while we are not privy to the issues that were being investigated by Ethics and Anti-Corruption Commission, their investigations appear to have been based on a complaint of alleged tender irregularities in the award of tender. It is also noted that based on the documents Ethics and Anti-Corruption Commission requested to facilitate their investigations, they focused mainly on addressing the complaint rather than reviewing the process of procurement. In addition, Ethics and Anti-Corruption Commission based its report on preliminary findings and have not issued a final report to date. The findings of Ethics and Anti-Corruption Commission in their investigations may not therefore serve to confirm that the procurement process complied with the law and the tender documents as stated in your legal opinion.

We have in our possession additional evidence that would indicate that the procurement process may not have been in tandem with the objectives of the Public Procurement and Disposal Act, 2005 as provided Under Section 2. (a) to (f) and, specifically, maximizing economy and efficiency. Some of the evidence available would also indicate that the process was not only non competitive but also flawed. The key amongst these issues include:

- i. A good tender process is judged by the quality of the preparation of the tender documents. The tender documents used for Greenfield Terminal were grossly inadequate going by the number of queries raised by the bidders, the various revisions done on the tender documents, unclear tender

evaluation criteria and several extensions of the tender period, etc.

- ii. The choice of procurement method adopted for the project required the bidder to Design, Build and take responsibility of arranging for financing. Although there has been an argument that the project was procured Under Section 76 of Public Procurement and Disposal Act, this method is mainly applicable to consultancy services or a combination of goods and services. The method adopted, therefore, does not comply with those ones prescribed in the Public Procurement and Disposal Act.
- iii. The Manual for Procurement and Management of Projects 2009, issued under the Public Procurement and Disposal Act stipulates that large civil works contracts including design and build projects, undergo a prequalification process. This was not done for the Greenfield project which is a large and complicated project.
- iv. During the tender period, several clarifications were issued by Kenya Airports Authority regarding the financing aspects of the project. In all these clarifications the response of Kenya Airports Authority was that a Bidder should not submit its bid if the bidder was not able to seek and confirm finances to fund the project. Surprisingly, just 9 days before the bid submission date, Kenya Airports Authority materially changed the requirements of the tender by removing the need for a financial proposal and instead introduced a Letter of Intent to finance the project. It should be noted that the financing proposal provided for in original tender documents required the financier to provide funding with firmed up terms and conditions which would then facilitate negotiations with Kenya Airports Authority. This is completely different to a Letter of Intent included under the changed bid. In other words, the change resulted to a Design and Build tender as opposed to a Design, Build and Finance tender originally issued by Kenya Airports Authority. A substantial change of tender is not allowed Under Section 62 Public Procurement and Disposal Act.

- v. The timing of the above substantial change of bidding requirements (9 days before bid opening) without giving additional time to accommodate this change is highly un-procedural and not consistent with Public Procurement and Disposal Act, Section 55(3). If the change had been communicated earlier, more bidders may have participated in the bidding process thereby having a more competitive bid.
- vi. The process of the Evaluation of bids resulted in only one bid qualifying for the Financial Proposals. Given the large number of bidders who collected the tender documents (numbering 110) and only 5 bids returned was an indication that the process may have had serious flaws. The complaint by the second ranked bidder, Larsen & Tuobro also raised concerns that the technical evaluation of bids may not have been fair and transparent. There was also contradictory information provided by Kenya Airports Authority as to the reasons why the second ranked bidder did not meet the minimum threshold for technical scores for them to qualify in the financial evaluation. The bidder averred that he had undertaken projects of similar or larger size and complexity in other countries.
- vii. The initial Cost estimate at the time of going to tender and as approved by the Chief Executive Officer of Kenya Airports Authority was US\$ 500million (Kshs.40billion). However the Engineers' Cost estimate contained in the bid evaluation report rose to Kshs.68,305,021,899.13. It is noted that Kenya Airports Authority had not undertaken any Preliminary design and had used the master plan for determining the project cost. With these conflicting amounts of cost estimates it is difficult to determine the best price for the project. The comparable project cost would have been known if more than one financial bid had been evaluated. It would appear that this project would be too expensive for the Government if a decision is made to move forward with this procurement process as the actual cost of the project can not be determined through the current procurement process.

- viii. The cost of the ongoing modernization and expansion at JKIA is estimated at US\$ 300 million which is expected to bring an additional capacity of 7.5 million passengers per year. The awarded bid price for the proposed Greenfield Terminal is US \$ 684 million and would create a capacity of about 8 million passengers per year. This would imply that this awarded bid is overpriced and would NOT result in value for money for the tax payers.
- ix. The speed at which the process from evaluation to award of contract was concluded raises disquiet. The bid evaluation was concluded on 14th December 2011, tender committee meeting held on 15th December 2011, award of contract communicated on 16th December 2011 and acceptance of award dated 19th December 2011. In addition, Kenya Airports Authority communicated the Tender committee decision of award of contract before the minutes were confirmed.
- x. Kenya Airports Authority after changing the structure and substance of the tender, where financing was no longer a requirement for the bid submission, should have confirmed the availability of funds before the award of tender as provided under Public Procurement and Disposal Act Section 26(6).
- xi. The proposed contract to be entered into between Kenya Airports Authority and the winning bidder is not a Fixed Price contract as is the practice for Design and Build contracts. The payments to the contractor, according to the tender documents, are based on measured work done using Bills of Quantities whose quantities are yet to be determined because the Design of the Greenfield Airport has not been undertaken. In the absence of a Fixed-Price contract and payment mechanism based on Bill of Quantities, it means that the actual price of the project cannot be determined with certainty and Kenya Airports Authority would have to take the risk of cost overruns. This project may end up costing the Government twice the amount quoted by the purported lowest bidder.

In view of the above facts or additional evidence, we strongly believe that the poor preparation of tender documents, choice of procurement method that is inconsistent with Public Procurement

and Disposal Act, last minute clarification on financing aspects, complaint by 2nd bidder, unclear cost estimate, non confirmation of tender minutes, awarding contract before confirmation of funding, and overpriced bid, are clear indications that the tender process was flawed.

We attach herewith a copy of the Inspectorate of State Corporations Report dated March, 2012 and the Cabinet Sub Committee Report on Tender for the Development of Greenfield Terminal at Jomo Kenyatta International Airport dated 10th April 2012 containing details and attachments in support of the above facts.

B) Analysis of the legal implications of terminating the procurement process

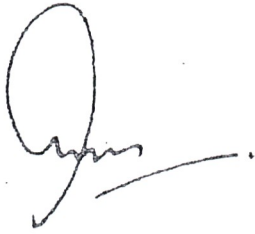
This Ministry appreciates your legal opinion on the implications of terminating the procurement proceeding after award which is supported by case laws. However, we accept as true that your legal opinion was based on available information at the time and the fact that you presupposed that the procurement process was in order. New evidence however, as provided above, demonstrates clearly that the procurement process was not only flawed but inconsistent with PPDA in addition to absence of value for money.

From a business point of view, proceeding with the tender in its current form will not yield value for money and the Government would stand to lose more by proceeding with this flawed procurement process and an overpriced contract. Before making a decision on the best way forward, it may be necessary to assess the cost implication of either proceeding with tender or terminating it. This way, an informed opinion can be arrived at. In any case, in terminating the tender process, the matter may or may not end up in court where a determination may be entered for or against the Government. Proceeding with the contract would result in cost implication which would be explicit while termination of the process would only result in contingent liabilities/cost which may or may not crystallize.

The Public Procurement Oversight Authority has been requested to review the matter as provided for Under Section 102 of Public

Procurement and Disposal Act, where, the Director General of Public Procurement Oversight Authority (PPOA) has powers to order an investigation of procurement proceedings for the purposes of determining whether there has been a breach of Public Procurement and Disposal Act. A report from Public Procurement Oversight Authority would then form a basis for which the Legal Opinion can be anchored as this is the organization vested in making a professional judgment on procurement and not the Ethics and Anti-Corruption Commission.

Warm regards

A handwritten signature in black ink, appearing to read 'Amos Kimunya', with a long horizontal flourish extending to the right.

Hon. Amos Kimunya, EGH, MP
MINISTER FOR TRANSPORT

Encl.

16th April, 2012

Dr. Mohammed Isahakia, CBS
Permanent Secretary
Office of the Prime Minister
Prime Minister's Building
NAIROBI

Dear

RE: LEGAL OPINION ON THE TENDER FOR DEVELOPMENT OF
GREENFIELD TERMINAL AT JOMO KENYATTA INTERNATIONAL
AIRPORT.

We refer to your letter Ref. OPMA/INF/89/330 dated 20th March 2012 informing me of the establishment of the Special Committee on Jomo Kenyatta International Airport (JKIA) Greenfield Terminal Project to:

- a) Review the procurement process for the tender for the Greenfield Terminal Project;
- b) Analyze the legal implications of terminating the procurement process; and
- c) Propose the way forward.

As you are aware, this Office issued a legal opinion to the Kenya Airports Authority on the instant matter vide a letter of even reference dated 22nd February 2012.

The said legal opinion addressed the following issues:

- a) Whether the bidding process produced an acceptable minimum number of technical and financial proposals;
- b) Whether the bidders offered to provide finance; and
- c) Whether to terminate the procurement proceedings and re-tender

On the first issue, this Office was of the opinion that KAA rightfully proceeded with the option of proceeding with the evaluation of the sole bid that was determined responsive after subjecting five (5) and two (2) bids to preliminary and technical evaluation, respectively. The option selected by KAA is set out in the Public Procurement and Disposal General Manual (PPDGM) to the effect that:

“Where only one or two bids are determined responsive the procuring entity shall have the option of proceeding with the evaluation or determining the entire tender non-responsive.”

Regarding the second issue, this Office opined that the bidders were not required to provide finance, instead they only had to propose a financier(s) which condition was fulfilled by the responsive bidder who gave two letters of intent/interest to finance the project from China Development Bank and Exim Bank of China.

On the third issue, our opinion was that, the only possibility of terminating the instant procurement proceedings is under Section 36 of the Act. However, *clause 3.27.3* of the request for proposals restricts the KAA’s right to annul the tendering process to *“any time prior to award of contract.”*

Thus, by seeking to terminate the procurement process after notification and acceptance of award of contract, the Authority will not only be contravening the provisions of *clause 3.27.3* of the request for proposals but also acting in bad faith; thereby undermining the integrity and fairness of the procurement process.

Subsequently, by a letter addressed to you and copied to this Office among others Ref. KAA/ES/JKIA/658/DB dated 27th March 2012, KAA submitted the following additional information on the matter as follows:

- a) JKIA Greenfield project summary; and
- b) Correspondences with various government offices, namely:
 - (i) The Office of the Prime Minister,
 - (ii) Ministry of Transport,
 - (iii) Ministry of Finance, and
 - (iv) The Ethics and Anti-Corruption Commission.

Considering that the said additional information is intended to guide the Special Committee on the discharge of its mandate, this Office has deemed it necessary to render another legal opinion on the issues referred to the Special Committee, as follows:

A. Review the procurement process for the tender for the Greenfield Terminal Project

As already mentioned, this Office has already issued a legal opinion touching on the competitiveness of the procurement process and the financing requirement.

Upon studying the additional information, particularly the letter from the Ethics and Anti-Corruption Commission (EACC) Ref. EACC.6/11/3/ (12) dated 15th February 2012; we note that the EACC conducted an investigation on alleged irregularities in the award of the instant tender. According to the letter under reference, preliminary investigation did not return "*any findings to warrant delay in implementation of the project.*"

This confirmation from the EACC serves to reinforce the opinion of this Office to the effect the procurement process complied with the law and the tender documents.

B. Analysis of the legal implications of terminating the procurement process

The previous legal opinion of this Office did not analyze the legal implications of terminating the procurement process. It only pointed out that termination of the procurement process after award would be contrary to KAA's undertaking, as stated in the tender documents to the effect that the tendering process could only be annulled at "*any time prior to award of contract.*"

Further, we have examined case law on this matter and noted that Courts do not rule in favour of procuring entities that terminate procurement proceedings after award. For instance, In Misc Civil Applic No 1260 Of 2007 *Selex Sistemi Integrati-V-Public Procurement Administrative Board and The Kenya Civil Aviation Authority* the Court stated that:

Eng. S.M. Gichuki
Managing Director
Kenya Airports Authority
P.O. Box 19001-00501
NAIROBI

Dear 

RE: LEGAL OPINION ON THE DEVELOPMENT OF GREENFIELD
TERMINAL AT JOMO KENYATTA INTERNATIONAL AIRPORT.

We refer to your letter dated 14th February, 2012, in which you had requested for our opinion on the issues raised in a letter by the Permanent Secretary, Ministry of Transport dated 10th January, 2012.

In granting our opinion we have examined the documents availed to us that is:

1. Letter by the Permanent Secretary Ministry of Transport dated 10th January 2012.
2. The request for proposal dated 12th August 2011.
3. The technical and financial evaluation report dated 14th December 2011.
4. The minutes of the KAA Board of Directors dated 9th March 2011.

We have noted the sequence of events as follows:

1. The Kenya Airports Authority (Authority) in a bid to enhance its passenger handling capacity and improve efficiency of hub operations at the Jomo Kenyatta International Airport plans to design and construct a new Greenfield terminal complex.

2. Pursuant to the foregoing, the Authority invited bids through open tendering in June, 2011 from eligible candidates for financing, design, construction of the terminal building and associated works, supply, installation of equipment, testing, commissioning and handing over the terminal to the Authority.
3. The eligibility criteria for the tender required the bidder to comply with the following:
 - a) Is a legal entity incorporated in the country or domicile or a joint venture linking such entities for purposes of carrying out and completing the works in the tender.
 - b) Provide evidence of having carried out and completed at least one similar sized international airport project in the last ten years.
 - c) Provide evidence of having carried out and completed at least one other urban mixed use commercial development of a similar floor area in the last 5 years.
 - d) Provide a consultant or link up with a firm of consultants who would have designed and supervised the construction of at least one similar sized international airport in the last 5 years.
 - e) Submit a letter of commitment to finance the project from a financier(s).
 - f) Provide a surety of Ksh 300 million.
 - g) Meet the minimum annual construction turnover of US \$ 200 million or equivalent in other currencies for the entity or for the lead firm.
 - h) The candidates will source for a suitable financier(s) meeting the minimum terms and conditions in the tender document.

The bidding process and Mode of evaluation

Bidding Process

4. The request for proposal was advertised in the local print media on 23rd June, 2011. 120 persons purchased the tender documents and only 5 firms' submitted proposals by the 17th November, 2011 which was the deadline.
5. *The firms that submitted their bids were the following:*
 - a) ^{Auhui} ~~Avus~~ Construction Engineering Group Co. Ltd (ACEG) & China national Aero-technology International Corporation (CATIC);
 - b) Beijing Construction Engineering Co. Ltd (BCEG) & Sinhydro Corp. Ltd joint venture;
 - c) Larsen & Toubro Ltd;
 - d) Citibank; and
 - e) SIFIKILE.

Mode of evaluation

6. The evaluation of the tender was done by following 3 steps, that is to say, preliminary, technical and financial evaluation.
7. Out of the five (5) firms that submitted proposals, one (1) firm (Citibank) was disqualified as it had only submitted a financial proposal.
8. The four (4) firms that remained were subjected to a preliminary examination to determine those that met the minimum mandatory requirements. Only two (2) firms (ACEG & CATIC and Larsen & Turbo) met these requirements and thereby qualifying for the detailed technical examination.
9. The qualifying score set out for the technical evaluation was 70%. ACEG & CATIC was ranked first with a score of 85.96% while Larsen & Turbo was ranked second with a score of 62.74%. Thus, ACEG &

CATIC was responsive to the technical evaluation and qualified to undergo the financial evaluation.

10. The financial evaluation was done by comparing the pre-bid estimate for works (which was Kshs 68,305,021,899.13 including taxes) against the financial proposal of ACEG & CATIC which was Kshs 64,745,354,315.00. Although the financial bid was -5.21% as compared to the pre-bid estimate, the same was within the 25% off the pre-bid estimate.
11. Further, the bidder had submitted two (2) letters of intent/interest to finance the project from China Development Bank Corp & China Exim Bank respectively.
12. With a combined financial and technical evaluation score of 90.98%, the bidder was found to be responsive to the conditions set out in the tender documents.
13. Subsequently, the Authority issued the successful bidder with a notification of award of the tender vide a letter dated 16th December 2011 and the bidder accepted the award on 19th December 2011.

The issues raised by the Permanent Secretary, Ministry of Transport

14. The Authority received a letter from the Permanent Secretary which stated as follows:
 - a) That the outcome of the bidding process did not produce an acceptable minimum number of technical and financial proposals that could be compared; and
 - b) None of the bidders offered to provide finance therefore the process should be undertaken on the basis of design and build only.
15. The Permanent Secretary, therefore, directed that a new tender be issued on a design, construct, cost and completion time etc and the financing was to be an added advantage.

The legal issues to be considered

- I. Whether the bidding process produced an acceptable minimum number of technical and financial proposals
16. The Public Procurement and Disposal Act of 2005 does not define competitive bidding. What the Act does is to provide for various methods of procurement; including open tendering, direct tendering and restrictive tendering.
17. The open tendering method of procurement is deemed to be the most competitive. The glossary of the Public Procurement & Disposal General Manual (PPDGM) which is issued pursuant to Section 9(c) (i) of the Act, indicates that open tendering is the preferred procurement method of Kenya that implies opening competition to the market with any restrictions. This can be compared to direct procurement that does not require use of competitive bidding.
18. The procedures to be followed in relation to open tendering are set out in Parts V and IV of the Act and Public Procurement and Disposal Regulations of 2006, respectively.
19. It is noteworthy that none of the provisions in the Act and the Regulations specifies the minimum number of technical and financial proposals to be evaluated. The requirement for competition can only be inferred from the use of terms such as, "comparison of tenders", "ranking" and "lowest evaluated price".
20. An attempt to set a minimum number of bids to be evaluated is made in the PPDGM. Part (o) of section 7.2 (Open Tendering Method) states that:

"Where only one or two bids are determined responsive the procuring entity shall have the option of proceeding with the evaluation or determining the entire tender non-responsive."
21. The PPDGM goes on to clarify that a procuring entity can only exercise this option if it included the same in the bidding documents.

However, it is not clear which of the two options needs to be included in the bidding documents – proceeding with the evaluation or determining the entire tender non-responsive.

22. In the instant tender, five firms submitted bids. One firm was disqualified. The remaining four firms were subjected to a three-step evaluation process. The first step was the preliminary evaluation and the four firms were subjected thereto after which two firms failed to meet the minimum mandatory requirements. Thus, only two firms proceeded to the second step, being technical evaluation. One firm was found unresponsive as a result of which only one firm proceeded to the third step – financial evaluation.

II. Whether the bidders offered to provide finance

23. We have already indicated that the eligibility criteria for the instant tender required the bidders to:

- a) Submit a letter of commitment to finance the project from a financier(s); and
- b) Source for a suitable financier(s) meeting the minimum terms and conditions in the tender document.

24. In this regard, the successful bidder submitted two letters of intent/interest to finance the project from China Development Bank Corp & China Exim Bank, respectively.

25. The fact that these two letters were submitted is sufficient proof that the successful bidder had sourced for the two financiers.

III. The directive to terminate the procurement proceedings and re-tender

26. There are three instances where procurement proceedings may be terminated:

- a) *Section 36* of the Act permits a procuring entity to terminate procurement proceedings at any time without entering into a contract. Where a procuring entity takes this step, the law requires it to promptly notify all the bidders and to give reasons for such termination to any bidder who requests for them. It is noteworthy that this provision has been qualified by *clause 3.27.2* of the request for proposals which restricts the right of the Employer to annul the tendering process to "any time prior to award of contract";
- b) *Section 65* of the Act requires a procuring entity to notify all the bidders that none of the bids was responsive. This notification implies termination; and
- c) Where only one or two bids are determined responsive and the procuring entity has stated in the bidding documents that it shall opt to determine the entire tender non-responsive, as per the PPDGM.

27. The instance in (b) does not apply in the instant case, as there was a responsive bid while (c) is subject an express provision in the bidding documents. The Authority can only exercise this option if it includes it in the bidding documents.

Way forward

1. In answer to question 1, going by the minimum number of bids indicated in the PPDGM and assuming that the Authority had included that option in the tender documents, the Authority ought to have exercised the option to determine the entire tender unresponsive after the technical evaluation, as only one firm emerged responsive.

Since the Authority proceeded to evaluate a sole financial bid, then the Authority rightfully opted to exercise the second option indicated in the PPDGM. That is to award the tender to the responsive bidder. Therefore, it is our view that the bidding

process produced an acceptable minimum number of technical and financial proposals.

- II. The second issue as to whether the bidders offered to provide finance, it is our view that the bidders were not required to provide finance, instead they only had to propose a financier(s) and we are informed that the responsive bidder gave two letters of intent/interest to finance the project from China Development Bank and Exim Bank of China.
- III. Thirdly, as regards the directive to terminate the procurement proceedings and re-tender, the only possibility of terminating the instant procurement proceedings is under Section 36 of the Act. However, *clause 3.27.3* of the request for proposals restricts the Authority's right to annul the tendering process to "*any time prior to award of contract.*"

Thus, by seeking to terminate the procurement process after notification and acceptance of award of contract, the Authority will not only be contravening the provisions of clause 3.27.3 of the request for proposals but also acting in bad faith; thereby undermining the integrity and fairness of the procurement process.

Yours



GITHU MUIGAI,
ATTORNEY GENERAL

CAA/ES/HQ/522/C

SECRET

14TH FEBRUARY, 2012



Hon. Prof. Githu Muigai, EGH, FCI Arb, MP
Attorney General
State Law Office
Attorney General Chambers
4th Floor
NAIROBI

Dear AG,

**RE: DEVELOPMENT OF GREENFIELD TERMINAL AT
JOMO KENYATTA INTERNATIONAL AIRPORT**

Kenya Airports Authority plans to design and contract a new Greenfield Terminal which is one of the key Vision 2030 flagship projects. The objective of the project is to increase passenger handling capacity and enhance aviation security and safety for Jomo Kenyatta International Airport.

Bids were invited through an open tender in June 2011. In the tender, bidders were required to submit a technical and financial proposal. They were also required to submit a financing proposal of financiers which KAA would engage separately to the contract.

After a five month submission period, five bids were submitted. Two(2) bidders failed at preliminary stage, three(3) bidders were subjected to technical evaluation and only one attained the pass mark to proceed to

SECRET

3) Noted
CK.

financial bid opening. After completion of evaluation, an award was made to Pascall & Watson Architects of UK and Anhui Construction Engineering Group of China (ACEG) in accordance with the Procurement & Disposal Act and Regulations. The award was communicated to the winner in December, 2011.

Thereafter, we have received a letter dated 10th January, 2012 from Permanent Secretary, Ministry of Transport which indicates that we cancel the award and repeat the process.

In view of that we had issued an award letter to the winning bidder, please advise the Authority as to how to proceed. Attached are the relevant documentations.

Yours *Sincerely,*



ENG. S. M. GICHUKI

MANAGING DIRECTOR

Encls.

SECRET



MINUTES OF THE 147TH BOARD OF DIRECTORS MEETING HELD ON
WEDNESDAY, 9TH MARCH, 2011 IN THE BOARDROOM, KENYA
AIRPORTS AUTHORITY HEADQUARTERS, NAIROBI

Present

| | | |
|------------------------|---|---|
| Hon. Martin N Wambora | - | Chairman |
| Mr. Kibuchi Muriithi | - | Director |
| Mrs. Catherine Kuria | - | Director |
| Mr. Hassan Kulow | - | Director |
| Mr. Macharia Njeru | - | Director |
| Mr. Joseph Tui Denar | - | Director |
| Mrs. Beatrice Gathirwa | - | Alternate Director Ministry of Finance |
| Mr. Aggrey Busena | - | Alternate Director Office of the President Internal Security & Prov Adm |
| Mr. Silas M. Gitari | - | Representing Alternate Director Ministry of Transport |
| Eng. Stephen Gichuki | - | Managing Director |

In attendance

| | | |
|------------------------|---|---------------------------|
| Eng. Philemon Chamwada | - | Ag. General Manager (ES) |
| Mr. Ken Kaunda | - | General Manager (HRD) |
| Mr. John Thumbi | - | General Manager (Finance) |
| Ms. Joy Nyaga | - | Ag. Corporation Secretary |

Mr. Philemon Chamwada (Ag. General Manager (P & ES) began by informing the meeting that the presentation was a follow up to the one made to the Minister for Transport on 3rd March, 2011. The presentation had incorporated all comments made during the presentation before the Minister

- **Projections on Passenger Volumes:** Members were informed that Kenya Airways had adjusted its projections upwards by 15% for the years 2015 and 2016. The airline however did not have projections beyond the year 2020. The projected growth of passenger volumes with regard to other airlines was affected by global GDP growth.
- **Capacity against demand:** The revised projections on passenger volumes together with the scaling down of package 3 development projects had resulted in a balance between capacity and demand.
- **Adjustment of Master Plan:** Modifications have been made as proposed during the presentation to the Minister by moving the cargo area situated next to proposed second runway; moving proposed hangers, moving proposed hotel/convention centre next to Greenfield terminal and re-organizing general business areas.

Members deliberated on the matters raised in the presentation whereupon they made the following observations:-

- **Catering:** Proposed area for airline catering service provider ought to be re-looked at as proximity to aircraft loading area is key.
- **Cargo Terminal:** Proposed cargo terminal next to second runway is convenient for airlines using the said runway.
- **Hangers:** Positioning ought to be re-looked at to guard against aircraft crowding.
- **Second Runway:** The meeting was informed the Permanent Secretary, Ministry of Transport had indicated that funds would be availed for the proposed second runway project. Members noted that they would only be able to adequately deliberate on the matter once official communication on the same had been received.
- **Greenfield Terminal:** Members noted that it was imperative that project implementation commences immediately in light of new passenger projections.

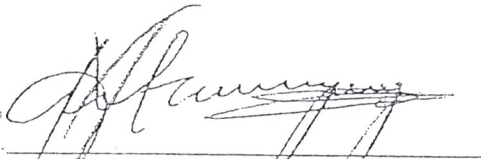
BOARD DECISION


The Board **approved** the JKIA Master Plan subject to proposed modifications in line with Members observations and further **directed** Management immediately commence the process of implementation of the Greenfield Terminal project.

3. *Payment of dividends by KAA to Treasury*
Management requested to make proposal on how much ought to be paid to Treasury by way of dividend.
4. *Matter of the Corporation Secretary*
It is necessary that the matter be finalized soon. Audit Committee to meet in a week and thereafter make recommendation to the disciplinary committee.
5. *Product Improvement*
Management requested to provide update.

There being no further business the Meeting closed at 2.45pm.

CONFIRMED AS A TRUE RECORD OF THE PROCEEDINGS OF THE BOARD.


MARTIN N. WAMBORA
CHAIRMAN


JOY W. NYAGA
AG. CORPORATION SECRETARY

DATE: 23rd July, 2011

DATE: 23rd JUNE, 2011



中国航空技术国际工程公司

China National Aero-Technology International Engineering Corporation

REF: JV.ACEG&CATIC/KAA/ES/JKIA/658/DB

19th/December 2011

The General Manager
Procurement and Logistics
Kenya Airports Authority
P.O. Box 19001-00501
Nairobi, Kenya

19 DEC 2011

Dear Sir:

**RE: DESIGN/BUILD TENDER FOR CONSTRUCTION OF THE GREEN
FIELD PASSENGER TERMINAL COMPLEX AND ASSOCIATED
WORKS AT THE JOMO KENYATTA INTERNATIONAL AIRPORT**

SUB: LETTER OF ACCEPTANCE

Refer to your letter with KAA/ES/JKIA/658/DB. dated on 16th December 2011;

We, Anhui Construction Engineering Group Co. Ltd (ACEG) In Joint Venture with China National Aero-Technology International Engineering Corporation (CATIC), hereby accept our tender for Design/Build for Construction of the Greenfield Passenger Terminal Complex and Associated Works at Jomo Kenyatta International Airport at a sum of USD 653,782,814.57 (inclusive of 10% Contingencies for the works, 5% for employer's supervision consultant and all taxes).

We will make arrangements with our proposed financiers for commencement of negotiations with the Authority.

Please find attached the Signed Letter, thank you.

Yours Faithfully,

Huang Hong You
On behalf of.

**Anhui Construction Engineering Group Co. Ltd (ACEG)
In Joint Venture with
China National Aero-Technology International Engineering Corporation
(CATIC)**

SECRET

REF: KAA/ES/JKIA/658/DB

8TH FEBRUARY, 2012

Dr. Cyrus Njiru, PhD, CBS
Permanent Secretary
Ministry of Transport
P.O. Box 52692 – 00200
NAIROBI

Dear

RE: DEVELOPMENT OF GREENFIELD TERMINAL AT JKIA

Reference is made to your letter Ref: MOT/AT/24/2 VOL. V/81 of 10th January, 2012 on the above subject.

Having consulted on this matter, KAA would like to clarify some of the issues raised in your letter as follows:

Five (5) bidders were evaluated, two (2) of which were knocked off after preliminary evaluation. The other three (3) were subjected to technical evaluation, of which two (2) did not attain pass mark to advance to financial bid opening. As per the procurement law, the most responsive bidder in technical evaluation who attained the required pass mark was subjected to financial evaluation.

SECRET

The bid was then adjudicated and awarded by the Tender Committee in accordance with the prevailing law. All bidders were promptly and appropriately informed of the outcome. In absence of any appeal from any bidder, we have proceeded to negotiate financing so that works can commence on time. KAA is committed to start construction works by August, 2012.

The tender documents did not require the bidder to have capability to finance the project by themselves as stated in the above letter. This tender was evaluated as a Design & Build basis. The requirement was for the bidders to source for a financier with whom the Authority would negotiate and sign a financing agreement.

Currently, KAA is negotiating financing with the financiers, namely China Development Bank and China Exim Bank, who had been proposed by the successful bidder. Upon conclusion of the negotiations, KAA will sign an agreement with the financier who offers the best terms.

A leading Aviation Consultant has already been procured by KAA through an open tender to review designs and supervise the construction works. In addition, KAA has set up a Projects Management Unit and recruited key professional staff to manage JKIA improvement project.

In view of the above therefore, we are satisfied with the response to the tender for the above works, the evaluation and adjudication as carried out.

Yours



ENG. S. M. GICHUKI

MANAGING DIRECTOR

CC: Hon. Martin Nyaga Wambora
Chairman, Board of Directors
Kenya Airports Authority

Mr. Francis T. Kimemia, CBS
Ag. Permanent Secretary, Secretary to the Cabinet and
Head of Public Service
Office of the President
NAIROBI

MINISTRY OF TRANSPORT
OFFICE OF THE PERMANENT SECRETARY

Telegrams "TRANSCOM" Nairobi
Telephone: 2729200, 344282
E-mail: ps@transport.go.ke

TRANSCOM HOUSE
NGONG ROAD
P.O. BOX 52692-00200
NAIROBI, KENYA

MOT/AT/24/2 VOL.V/81

10th January, 2012

Eng. Stephen Gichuri
Managing Director
Kenya Airports Authority
NAIROBI

Dear *Stephen,*

DEVELOPMENT OF GREENFIELD TERMINAL AT JKIA

Thank you for the briefing that you provided this morning when you visited the undersigned in the presence of the Chairman, Kenya Airports Authority. In the briefing you stated that in June 2011, about one hundred and twenty (120) documents were sold by KAA and that only five (5) bidders submitted bids by the time bids were closed in November, 2011. You also informed this office that the basis of tendering was design, finance and construction.

In addition, you informed this office that two (2) of the five (5) firms did not submit complete documents, as they submitted only one (1) part of financial and Technical Proposal each. These two (2) firms were therefore disqualified from the outset. You stated that of the remaining three (3) firms, two (2) firms failed the technical proposal stage. Hence only one (1) firm had its technical proposal as being acceptable to Kenya Airports Authority (KAA). This means that only one firm had its financial proposal analysed, having had its Technical proposal considered acceptable by KAA. You further stated that even this one firm did not have capability to finance the project by themselves, as they were to source for finance from Exim Bank and China Development Bank in China. In addition, you indicated that KAA was to enter into a separate

.....Transport for Prosperity.....



INTERNATIONAL TENDER NOTICE

DESCRIPTION OF WORKS: DESIGN/BUILD TENDER FOR CONSTRUCTION OF THE GREENFIELD PASSENGER TERMINAL COMPLEX AND ASSOCIATED WORKS AT THE JOMO KENYATTA INTERNATIONAL AIRPORT (TENDER NO. KAA/ES/JKIA/658/DB)

- 1.1 The Kenya Airports Authority as part of vision 2030 flagship project intends to enhance its Passenger Handling Capacity and improve on the efficiency of hub operations at Jomo Kenyatta International Airport through construction of a new Greenfield Passenger Terminal Complex.
- 1.2 The new Passenger Terminal Complex shall be a new terminal building with floor area of about 178,000 square metres on four levels conceived as a hub terminal for efficient connectivity for transiting passengers. Among other facilities, it will have 50 international check in positions; 32 contact and 8 remote gates; associated apron with 45 aircraft stands and linking taxiways (paved area 950,000 square metres), all landside and airside roads and all associated utilities.
- 1.3 The Kenya Airports Authority invites tenders from eligible candidates for financing, design, construction of the terminal building and associated works, supply, installation of equipment, testing, commissioning and handing over of the Greenfield Terminal Complex to the Authority.
- 1.4 Eligible candidates shall meet the following minimum requirements:
 - i) Shall be an entity legally incorporated in the country of domicile or a joint venture linking such entities for purposes of carrying out and completing the works in this Tender
 - ii) Shall provide evidence of having carried out and completed at least 1(one) no. Similar sized International Airport project in the last ten (10) years.
 - iii) Shall provide evidence of having carried out and completed at least one other urban mixed-use commercial development of a similar floor area in the last five (5) years.
 - iv) Shall provide a consultant or link up with a firm of consultants who would have designed and supervised the construction of at least one similar sized International Airport project in the last five years.
 - v) Shall meet minimum average annual construction turnover of US\$200million or equivalent in other currencies for the entity or for the lead firm. The turnover shall be calculated as total certified payments received for contracts in progress or completed, within the last five (5) years
- 1.5 Eligible candidates may obtain further information and inspect the tender documents at Kenya Airports Authority Headquarters, 2nd floor, office of the General Manager (Procurement & Logistics) from 8.00am to 5.00pm local time, Monday to Friday except lunch time between 1.00pm and 2.00pm and on public holidays.
- 1.6 A complete tender document may be obtained by any interested tenderer on submission of a written application and upon payment of a non-refundable fee of Kshs. 5,000.00 payable to the Kenya Airports Authority. Candidates are advised that the fee does not include postage charges and are strongly advised to arrange for direct collection of the tender documents.
- 1.7 Completed tenders should be submitted accompanied by a tender security issued by a reputable bank in the amount of Kshs. 300,000,000.00 or equivalent in freely convertible currency to be received on or before (Wednesday, 11.00am 21st September 2011). Failure to provide tender security will lead to disqualification of the tender.
- 1.8 As part of their tender submission the candidates will source for suitable financier(s) meeting the minimum terms and conditions stated in the tender document. The proposed Financier will be expected to negotiate with the Authority and enter into a separate financing agreement with the Authority for the financing.
- 1.9 Prices quoted shall be inclusive of duty and other taxes and shall remain valid for 120 days from the closing date of the tenders.
- 1.10 A pre-bid conference will be held at Kenya Airports Authority Headquarters Complex Building, 5th floor conference room on 19th July 2011 at 11:00 AM. Bidders to make own arrangement to attend.
- 1.11 Completed tender documents shall be submitted in two envelopes (i.e. The Technical and the Financial proposal) and as per the requirement of the tender in plain sealed envelopes clearly marked with the Tender number and name of the tender and marked "DO NOT OPEN BEFORE Wednesday, 11.00am, 21st September 2011" and be deposited in the Tender Box located on the 2nd Floor of Kenya Airports Authority Headquarters Building at JKIA, so as to be received at 11:00am. Late bids shall be rejected.
- 1.12 The Technical Proposal Envelope will be opened immediately thereafter at the Conference Room, 5th floor, KAA HQ's Building in the presence of tenderers/representatives who wish to attend and evaluated in accordance with the evaluation procedure. Financial Proposal for those who have passed the Technical Proposal will be opened in the presence of tenderers or their representatives who choose to attend the opening at Kenya Airports Authority Headquarters Building at JKIA Airport NAIROBI, Conference Room on 5th Floor.
- 1.13 The address of the procuring entity for any enquiries shall be:-

The Managing Director
 Attn: General Manager (Procurement and Logistics)
 Kenya Airports Authority
 P. O. Box 19001 – 00501
 NAIROBI-KENYA
 Tel No: 254 – 020 – 825400/822111/6611000/5612000
 Fax No: 254 – 020 – 822078
 E-mail: stephen.gichuki@kenyaairports.co.ke
 E-mail: philemon.charmwada@kenyaairports.co.ke
 E-mail: allan.muturi@kenyaairports.co.ke

The Authority reserves the right to accept or reject any tender without giving reasons thereof and does not bind itself to accept the lowest or any tender.

Canvassing for the tender by the tenderer or by proxy shall lead to automatic disqualification of their tender.

This advertisement supersedes the invitation to tender which appeared on 22nd June 2011 in the print media.

ALLAN M. MUTURI
 GM (PROCUREMENT & LOGISTICS)
 FOR MANAGING DIRECTOR

financing Agreement with a suitable financial institution to finance the Project.

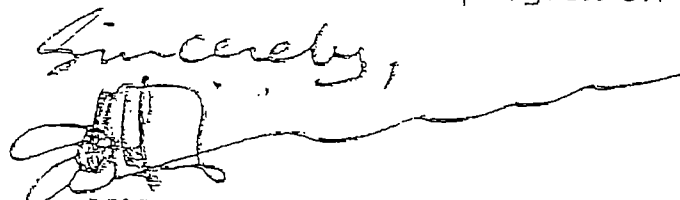
Following consultation on this matter with the Honorable Minister for Transport, I have been directed to advise you to prepare a brief to the Cabinet on the progress of Development of the Greenfield Terminal at JKIA so that the Hon. Minister may present the same to the Cabinet. You will recall that the Office of the Prime Minister requested for a brief on this project vide letter Ref.OPMI-INF/89/259 dated 14th November, 2011.

I have further been directed to advise you that as the outcome of the bidding process has clearly not produced an acceptable minimum number of acceptable Technical and Financial Proposals that could be compared and that since none of the bidders has offered to provide finance, the process should be undertaken on the basis of design and build only. Bidders should compete on the basis of design, construction cost and completion time, etc, and financing should only be an added advantage (perhaps through supply credit), as KAA would end up signing a separate financing agreement with a suitable financier.

The brief on the process undertaken so far and recommendations for development of the Greenfield Terminal as advised should be presented to this office as soon as possible to enable the Hon. Minister to give a presentation to the Cabinet, obtain consensus within Government on the proposed way forward, after which you should go ahead with bidding on the basis of design and build, leaving financing to be undertaken directly by KAA.

Please take appropriate action as advised, and treat as urgent considering the need to make progress on this Project.

Yours

Sincerely,


Dr. Cyrus Njiru, PhD, CBS
PERMANENT SECRETARY

Copy to: **Hon. Martin N. Wambora**
Chairman
Kenya Airports Authority
NAIROBI

**A REPORT BY ETHICS & ANTI-CORRUPTION COMMISSION
PRESENTED TO PARLIAMENTARY JOINT COMMITTEE ON
FINANCE PLANNING & TRADE TRANSPORT PUBLIC WORKS
& HOUSING AND BUDGET ON WEDNESDAY 5TH SEPTEMBER
2012 11.00 A.M.**

The allegation

The Ethics and Anti- Corruption Commission on of 17th January 2012 received an anonymous complaint of alleged tender irregularities in the award of tender number KAA-ES/JKIA/658-DT (Construction of Green Field Terminal) worth US Dollars 500 million as advertised in the daily newspapers on the 22nd June 2011.

It was further alleged that there was a conspiracy involving the KAA Managing Director and the Permanent Secretary Ministry of Finance to award the tender to **Larson Toubro Company** at US Dollars 640 million despite other companies quoting within the budgeted range. The allegation was that **Larson Toubro Company** was to give the excess US Dollars 140 million as a kick back to the KAA MD and the PS, the conduit for the bribe was a broker by the name the name of Mohan, a frequent visitor to the office of the PS and the MD.

The Inquiry

The Commission requested and was given by KAA the following documents on 20th January 2012:

- i. Advertised notice date
- ii. Memo approving commencement of procurement process dated 21st June 2011.
- iii. Evaluation Report (technical and financial)
- iv. Copy of opening register
- v. The minutes of opening of the tender, tender No: KAA/ES/JKIA/658/BD
- vi. Letter of acceptance
- vii. Minutes of pre-bid meeting opening the tender.
- viii. Notification of award
- ix. International tender notice.

Findings

After scrutiny and analysis of the documents it was revealed that:

- i. The tender was opened 17th November 2011.
- ii. After evaluation Anhui Construction Engineering Group Co.Ltd (ACEG) in Joint Venture with China Aero-Technology International Engineering Corporation

(CATIC), Address 23002,325 Wuhu Road, Baohe District, and Hefei City China were awarded the tender.

- iii. A notification of award was issued on 16th December 2011 and the negotiations were to begin after 14 days.
- iv. The Company accepted the award on 19th December 2011.

Larson Toubro Company the company alleged to have been associated with the KAA MD and the PS Finance was eliminated at the technical evaluation stage.

Correspondences

1. MD KAA to EACC

On 20th January 2012 our team of investigators visited the airports authority to inquire on the tender documents which were delivered and a receipt memo (**marked X1**) signed by the collecting investigating officer.

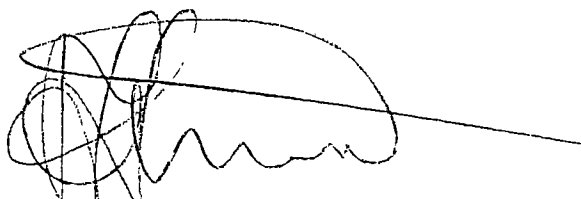
Subsequent to this visit the Managing Director of Kenya Airports Authority corresponded to the Commission on 26th January 2012 vide letter Ref. KAA/01/1C/2012(**marked X2**) for clarification on the inquiry.

2. EACC to MD KAA

On 31st January 2012 the Commission in a letter Ref. EACC.6 /11/3/(10) (**marked X3**) to the Airports Authority Managing Director requested various copies of documents relating to the tender to facilitate in the inquiry of the alleged irregularities.

3. EACC to MD KAA

On 15th February 2012 the Commission in a letter Ref. EACC.6/11/3/(12) (marked X4) to the Airports Authority Managing Director informed him of the collection of copies of the tender documents and progress of the preliminary investigation indicating that this did not bar the procuring entity from proceeding with the tender process with adherence to maximum integrity.



M. K. BOSIRE

FOR: SECRETARY/CHIEF EXECUTIVE OFFICER

JM/hm

Appendix

Documents

- X1** Memo dated 20th January 2012 on inventory of documents collected by EACC
- X2** Letter seeking clarification from MD KAA to EACC
- X3** Letter from EACC requesting documents
- X4** Letter from EACC to MD KAA on progress of investigations



Kenya Airports Authority

Head Office, Airport North Road
P.O. Box 19001 - 00501 Nairobi, Kenya
Tel: +254 - 020 - 822111 / 6611000 / 6661200
Fax: +254 - 020 - 822078, 827304
Email: info@kenyaairports.co.ke
www.kenyaairports.co.ke



Att. No.

birds - procurement

X 1

20th January 2012

The following copies of documents/letters have been handed over to the investigative officer from KACC

- 1. Advertised notice date ✓
- 2. Memo approving commencement of procurement process dated 21/6/2011 ✓
- 3. Evaluation Report (technical and financial) ✓
- 4. Copy of opening register ✓
- 5. The minutes of opening of the tender, Tender No: KAA/ ES/JKIA/658/BD
- 6. Notification of award ✓
- 7. Letter of acceptance ✓
- 8. International tender notice ✓

Handed over by.....

Margaret Muraya

For: Kenya Airports Authority

Received by..... *J. Gillo* *D-2135450*

Joseph O. Gillo

For: Kenya Anti Corruption Commission



Kenya Airports Authority

Head Office, Airport North Road
P.O. Box 19001 - 00501 Nairobi, Kenya
Tel: +254 - 020 - 822111 / 66611000 / 6661200
Fax: +254 - 020 - 822078 / 827304
Email: info@kenyaairports.co.ke
www.kenyaairports.co.ke

10
11

KAA/O1/IC/2012

6/11/3

26th January, 2012

Mr. Peter Mwangi
Deputy Head of Investigations and
Asset Recovery
The Ethics and Anti-Corruption Commission
Integrity Centre

1 FEB 2012

00120302

Response done
EACC 6/11/3/10
K - pio
31/1/2012

Dear Mr. Mwangi,

RE: GREENFIELD PROJECT TENDER DOCUMENTS

I have been informed by my officers from Procurement department that on 20th January, 2012 two officers from The Ethics and Anti-Corruption Commission took away copies of tender documents and evaluation reports for the above named project.

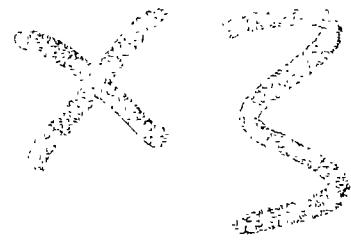
Further, they informed them that they want to conduct investigations on the above tender.

While we welcome investigations, if any, on above tender or any other areas that you may wish to, it is not clear whether the due process was followed. I am not sure whether the alleged investigators were from your organisation. Procedurally, the officers should have brought to me a letter of introduction and inform me, as expected, that they are conducting investigation on matters concerning Kenya Airports Authority.

I am writing therefore to seek your advise on whether there are areas we can assist in the investigation, if indeed you are conducting any, and clarification on whether the two officers, led by a Mr. Joseph O. Gillo (ID 21354050) are from your organization.

Yours Sincerely,

ENG. S.M.GICHUKI
MANAGING DIRECTOR



ETHICS AND ANTI-CORRUPTION COMMISSION

INTEGRITY CENTRE (Valley Rd /Milimani Rd. Junction) P.O Box 61130 -00200, NAIROBI, Kenya
TEL.. 254 (020) 2717318/ 310722, MOBILE 0729 888881/2/3
Fax. 254 (020) 2719757 Email eacc@integrity.go.ke Website www.eacc.go.ke

When replying please quote

EACC6/11/3/(10)

31st January 2012

The Managing Director
Kenya Airports Authority
P O Box 19001 – 00501
NAIROBI

RE: GREENFIELD PROJECT TENDER DOCUMENTS

Following a complaint received by the Ethics and Anti Corruption Commission regarding an alleged tender irregularity for the construction of Green Field Terminal at the Jomo Kenyatta International Airport, the Commission authorised verification of the allegation through an inquiry by our Investigating officers Mr. Joseph O.Gilo and Stephen Ndeti.

To facilitate the enquiry, the investigating officers requested and received the following copies of documents:

1. International tender notice for tender No.KAA/ES/JKIA/658/BD
2. Technical and financial evaluation report dated 14th Dec.2011.
3. Invitation to Tender Advertisement dated 22nd June 2011.
4. Copy of tender opening register dated 9th Dec.2011
5. Memo approving commencement of procurement process dated 21/6/2011.

6. Letter of acceptance
7. Minutes of pre-bid meeting opening the tender, tender No.KAA/ES/JKIA/658/BD
8. Notification of award.
9. Minutes for Tender opening held on 17th November 2011 with attached names of bidder's representatives.

We thank you and your organization for the continued cooperation and we will revert back upon analysis of the information availed to the investigating officers.



J.K. Mue
Ag. Secretary/Chief Executive Officer



X4

ETHICS AND ANTI-CORRUPTION COMMISSION

INTEGRITY CENTRE (Valley Rd /Milimani Rd. Junction) P O Box 61130 -00200, NAIROBI, Kenya
TEL 254 (020) 2717318/ 310722, MOBILE 0729 888881/2/3
Fax: 254 (020) 2719757 Email: eacc@integrity.go.ke Website: www.eacc.go.ke

When replying please quote:

EACC.6/11/3/(12)

The Managing Director
Kenya Airports Authority
P O Box 19001 – 00501
NAIROBI



15th February 2012

RE: TENDER FOR CONSTRUCTION OF GREEN FIELD TERMINAL AT JOMO KENYATTA INTERNATIONAL AIRPORT (JKIA)

Refer to our earlier letter ref: EACC6/11/3/(10) dated 31st January 2012 on the above subject.

Following a complaint of alleged tender irregularities in the award of tender Number KAA-ES/JKIA/658- DT advertised in the Daily Newspapers on 22nd June 2011, the Commission collected copies of specified tender documents from your offices and undertook a preliminary investigation to verify the veracity of the allegations.

The preliminary investigation has not returned any findings to warrant delay in implementation of the project. You may proceed with the project as planned and ensure maximum integrity during the implementation phases.

We thank you and your organization for the continued cooperation.

J. K. Mue
AG. SECRETARY/CHIEF EXECUTIVE OFFICER



Kenya Airports Authority

Head Office, Airport North Road
P.O. Box 19001 - 00501 Nairobi, Kenya
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GREENFIELD TERMINAL PROJECT AT JKIA

ANNEX OF COPIES OF DOCUMENTS SUBMITTED BY KENYA AIRPORTS AUTHORITY BOARD OF DIRECTORS SCHEDULE TO PARLIAMENTARY TRANSPORT/FINANCE/BUDGET COMMITTEES ON 30TH AUGUST, 2012.

1. Board's Oversight role citings.
2. PROJECT BUDGET

USD 500 Million approved by the Board at the time of KAA's Master Plan. Approval see Annex 1: 2010/2011.
3. 14th November 2011: Prime Minister's letter.

15th December 2011: Tender Award for USD 653,782,814.57.
4. 16th December 2011: Notification of Award.
5. 19th December 2011: Acceptance of Award by Anhui Construction Engineering Group Company Limited (ACFG) in joint venture with China Aero-Technology International Engineering Corporation (CATIC).
6. 10th January 2011: Permanent Secretary, Ministry of Transport's letter.
7. 11th January 2012: Terms and Condition of the loan by China Development Bank to KAA.
8. 10th February 2012: Permanent Secretary, Ministry of Transport's letter.

9. 21st February 2012: Board Resolution for annulling the process.
10. 22nd February 2012: Attorney General's Legal Opinion.
11. 22nd May 2012: KAA Board's Resolution for annulment of procurement process.
12. 27th July 2012: KAA's Tender Committee recommended termination of the Tender.
13. 31st July 2012: Memo by the Managing Director KAA interfering with the decision of the KAA Tender Committee.

Annex 1: The Board's Oversight Role Citings

The State Corporations Act, Cap. 446

Accountability

15. (1) A Board shall be responsible for the proper management of the affairs of a state corporation and *shall be accountable for the moneys*, the financial business and the management of a state corporation.

The Kenya Airports Authority Act, Cap. 395

6. **Managing Director:** In exercise of its duty under section 8, and subject to any directions of a general nature which may be given by the Minister the **Board** may-

(f) *give directions to the managing director.*

10. **Powers of the Board:** In exercise of its duty under section 8, and subject to any directions of a general nature which may be given by the Minister the Board may-

- (a) determine the provisions to be made for capital and recurrent expenditure, reserves and dividends during each financial year;
- (b) approve any minor alterations in salaries, wages or other terms and conditions of service of employees;
- (c) *approve any individual capital work for the purpose of the Authority, not included within the programme of works approved by the Minister, of which the estimated cost does not exceed ten million shillings or such other sum as the Minister, from time to time, by order determine;*
- (d) consider legislative proposals and recommend their enactment to the Minister;
- (e) approve any alteration in the establishment of the Authority involving a major re-organisation or a substantial reduction in the number of employee; and
- (f) give directions to the managing director.

11. **Power of the Minister:** The Minister may-

- (a) *give directions of a general nature to the Board relating to the operation of the undertakings of the Authority;*
- (b) approve any alterations in the tariffs, rates and other charges made for the services provided by the Authority;
- (c) approve alteration in salaries, wages or other terms and conditions of service of employees;

- (d) *in consultation with the Minister responsible for finance, approve, any individual capital work for purposes of the Authority which the estimated cost exceeds ten million shillings; and*
- (e) give directions to the Board concerning any matter involving an agreement with or the interest of any other country or territory.

8. General duties of the Board

(1) It shall be the duty of the Board to –

- (a) provide by means of undertakings of the Authority, a co-ordinated system of aerodromes and facilities relating thereto;
- (b) administer, control and manage aerodromes and any other property vested in it under this Act;
- (c) provide, develop and maintain such services and facilities as are in its opinion necessary for the efficient operation of aircraft, excluding air Navigational aids other than visual aids to navigation except with the consent of the Minister;
- (d) provide rescue and fire fighting equipment and services at aerodromes; and
- (e) approve the establishment of private airstrips and control the operations thereof.

(2) In the performance of its functions under subsection (1), the Board may-

- (a) construct, alter or maintain buildings at aerodromes or elsewhere;
- (b) value land and property for the purposes of the Authority;
- (c) purchase land or buildings;
- (d) grant on such terms and conditions as the Authority deems fit, Authority to carry on any trade or business at aerodromes, and
- (e) carry on such activities as appear to it dangerous, necessary or desirable for or in connection with the exercise and performance of its functions.

(3) The performance of the duties referred to in subsection (1) shall include a general duty to ensure-

- (a) that the fullest development consistent with the economy of the undertaking of the Authority is attained.
- (b) that the undertakings of the Authority are operated efficiently, economically and with regard to safety.
- (c) That the Authority provides all reasonable facilities other than visual aids to ----- for the handling and operation of aircraft and their passengers and
- (d) that no particular person or body is given undue preference or subjected to any undue advantage.

ANNEX 2 : BUDGET

PHASE I (2011-2015) cost estimates for Greenfield terminal

| NEW GREEN FIELD TERMINAL | COST (USD) |
|---|-----------------------|
| Commercial Apron | 125,756,985.00 |
| Taxiways, Connector Taxiways, and Taxiway Shoulders | 10,936,845.50 |
| GSE Areas | 2,593,800.00 |
| Bus Parking Areas | 1,386,000.00 |
| Terminal Building | 265,594,500.00 |
| Vehicular Parking Areas | 4,023,360.00 |
| | 1,126,125.00 |
| Airport Access Road | 1,446,984.00 |
| Power Sub-Station Building | 36,000.00 |
| Water Tanks | 100,000.00 |
| SUB-TOTAL 1 | 413,000,599.50 |
| Engineering Services (10%) | 41,300,059.95 |
| SUB-TOTAL 2 | 454,300,659.45 |
| Contingency (10%) | 45,430,065.95 |
| GRAND TOTAL | 499,730,725.40 |

ANNEX 3: PM'S LETTER

17 NOV 2011



16 NOV 2011

OFFICE OF THE PRIME MINISTER
PERMANENT SECRETARY'S OFFICE



Prime Minister's Building
P. O. BOX 74434-CO200
Harambee Avenue
NAIROBI

Fax No.: +254-(0)20-2210876
Telephone: +254-(0)20-3247000
When replying please quote

Ref: OPM1/INF/89/259

Date: 14th November, 2011

Dr. Cyrus Njiru, CBS
Permanent Secretary
Ministry of Transport
NAIROBI

Dear:

PS,

REF: TENDER FOR THE DEVELOPMENT OF SECOND TERMINAL AND RUNWAY
AT JOMO KENYATTA INTERNATIONAL AIRPORT THROUGH PUBLIC DEBT

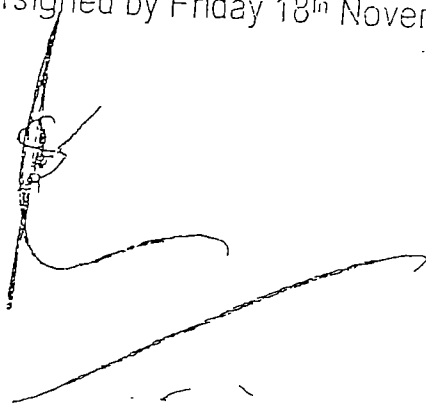
Reference is made to the above subject matter concerning the ongoing procurement process under a Public Debt framework for the development of a second passenger terminal together with a runway at Jomo Kenyatta International Airport.

The project as structured does require mobilization of massive resources with approvals by various arms of government. Consequently, Cabinet approval is required for implementation of the project to protect public interest. It is the view of this office that the ongoing procurement process may not achieve the desired results without going through Cabinet approval as required under the new Constitution.

The purpose of this letter is to therefore recommend that the ongoing procurement process be stopped immediately and that you commence the mechanism of seeking Cabinet approval for the same by way of a Cabinet Memorandum.

Please urgently prepare a brief on the status of the said procurement process to read the undersigned by Friday 18th November, 2011.

Yours



DR. MOHAMED ISAHAKIA, CBS
PERMANENT SECRETARY

C.C. Amb. Francis K. Muthaura, EGH,
Permanent Secretary, Secretary to the Cabinet
Head of Public Service
Office of the President
NAIROBI.

Mr. Joseph Kinyua, CBS
Permanent Secretary
Office of the Deputy Prime Minister and
Ministry of Finance/ Treasury
NAIROBI

Eng. Stephen Gichuki
Managing Director
Kenya Airports Authority
NAIROBI

100 (108)



Kenya Airports Authority

6 1
Head Office, Airport North Road
P.O. Box 19001 - 00501 Nairobi, Kenya
Tel: 254 - 020 - 822111 / 6611000 / 6612000
Fax: 254 - 020 - 822078, 827304
E-mail: info@kenyaairports.co.ke
www.kenyaairports.co.ke

NOTIFICATION OF AWARD

KAA/ES/JKIA/658/DB

16th December, 2011

Anhui Construction Engineering Group Co. Ltd. (ACEG)
In Joint Venture with China Aero-Technology International
Engineering Corporation (CATIC)
Address 230002
325 Wuhu Road,
Baohe District, Hefei City,
CHINA

Dear Sir/Madam

RE: DESIGN/BUILD TENDER FOR CONSTRUCTION OF THE GREENFIELD PASSENGER
TERMINAL COMPLEX AND ASSOCIATED WORKS
AT THE JOMO KENYATTA INTERNATIONAL AIRPORT

KAA/ES/JKIA/658/DB

This is to notify you that your tender for Design/Build for Construction of the Greenfield Passenger Terminal Complex and Associated Works at the Jomo Kenyatta International Airport at a sum of US\$ 653,782,814.57 (inclusive of 10% contingencies for the works, 5% for employer's supervision consultant and all taxes) has been accepted.

By copy of this letter you are required to make arrangements with your proposed financier(s) for commencement of negotiations directly with the Authority which shall not be earlier than fourteen (14) days from the date of this letter.

The contract shall be signed by the parties after successful negotiations and signing of a loan agreement with the financiers and submission of the performance guarantee.

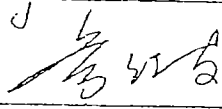
Yours faithfully,

ENG. S. M. GICHUKI
MANAGING DIRECTOR

Please sign and return a copy of this letter to signify your acceptance of this award.

Name of Authorized Representative Huang Hong You

Designation Managing Director On behalf of JV. ACEG & CATIC

Sign 

Date 19th December, 2011



中国航空技术国际工程公司

China National Aero-Technology International Engineering Corporation.

REF: JV.ACEG&CATIC/KAA/ES/JKIA/658/DB

19th/December 2011

The General Manager
Procurement and Logistics
Kenya Airports Authority
P.O. Box 19001-00501
Nairobi, Kenya

19 DEC 2011

Dear Sir:

RE: DESIGN/BUILD TENDER FOR CONSTRUCTION OF THE GREEN
FIELD PASSENGER TERMINAL COMPLEX AND ASSOCIATED
WORKS AT THE JOMO KENYATTA INTERNATIONAL AIRPORT

SUB: LETTER OF ACCEPTANCE

Refer to your letter with KAA/ES/JKIA/658/DB, dated on 16th December 2011;

We, Anhui Construction Engineering Group Co. Ltd (ACEG) In Joint Venture with China National Aero-Technology International Engineering Corporation (CATIC), hereby accept our tender for Design/Build for Construction of the Greenfield Passenger Terminal Complex and Associated Works at Jomo Kenyatta International Airport at a sum of USD 653,782,814.57 (inclusive of 10% Contingencies for the works, 5% for employer's supervision consultant and all taxes).

We will make arrangements with our proposed financiers for commencement of negotiations with the Authority.

Please find attached the Signed Letter, thank you.

Yours Faithfully,

Huang Hong You
On behalf of.

Anhui Construction Engineering Group Co. Ltd (ACEG)
In Joint Venture with
China National Aero-Technology International Engineering Corporation
(CATIC)

Amey 6



**MINISTRY OF TRANSPORT
OFFICE OF THE PERMANENT SECRETARY**

Telegrams "TRANSCOM" Nairobi
Telephone: 2729200, 344282
E-mail: ps@transport.go.ke

TRANSCOM HOUSE
NGONG ROAD
P.O. BOX 52692-00200
NAIROBI, KENYA
10th January, 2012

MOT/AT/24/2 VOL.V/81

Eng. Stephen Gichuki
Managing Director
Kenya Airports Authority
NAIROBI

Dear *Stephen,*

DEVELOPMENT OF GREENFIELD TERMINAL AT JKIA

Thank you for the briefing that you provided this morning when you visited the undersigned in the presence of the Chairman, Kenya Airports Authority. In the briefing you stated that in June 2011, about one hundred and twenty (120) documents were sold by KAA and that only five (5) bidders submitted bids by the time bids were closed in November, 2011. You also informed this office that the basis of tendering was design, finance and construction.

In addition, you informed this office that two (2) of the five (5) firms did not submit complete documents, as they submitted only one (1) part of financial and Technical Proposal each. These two (2) firms were therefore disqualified from the outset. You stated that of the remaining three (3) firms, two (2) firms failed the technical proposal stage. Hence only one (1) firm had its technical proposal as being acceptable to Kenya Airports Authority (KAA). This means that, only one firm had its financial proposal analysed, having had its Technical proposal considered acceptable by KAA. You further stated that even this one firm did not have capability to finance the project by themselves, as they were to source for finance from Exim Bank and China Development Bank in China. In addition, you indicated that KAA was to enter into a separate

financing Agreement with a suitable financial institution, to finance the Project.

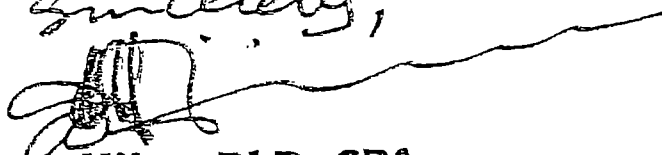
Following consultation on this matter with the Honorable Minister for Transport, I have been directed to advise you to prepare a brief to the Cabinet on the progress of Development of the Greenfield Terminal at JKIA so that the Hon. Minister may present the same to the Cabinet. You will recall that the Office of the Prime Minister requested for a brief on this project vide letter Ref.OPM1.INF/89/259 dated 14th November, 2011.

I have further been directed to advise you that as the outcome of the bidding process has clearly not produced an acceptable minimum number of acceptable Technical and Financial Proposals that could be compared and that since none of the bidders has offered to provide finance, the process should be undertaken on the basis of design and build only. Bidders should compete on the basis of design, construction cost and completion time, etc, and financing should only be an added advantage (perhaps through supply credit), as KAA would end up signing a separate financing agreement with a suitable financier.

The brief on the process undertaken so far and recommendations for development of the Greenfield Terminal as advised should be presented to this office as soon as possible to enable the Hon. Minister to give a presentation to the Cabinet, obtain consensus within Government on the proposed way forward, after which you should go ahead with bidding on the basis of design and build, leaving financing to be undertaken directly by KAA.

Please take appropriate action as advised, and treat as urgent considering the need to make progress on this Project.

Yours *Sincerely,*



Dr. Cyrus Njiru, PhD, CB&
PERMANENT SECRETARY

Copy to: **Hon. Martin N. Wambora**
Chairman
Kenya Airports Authority
NAIROBI

11 January 2012



国家开发银行股份有限公司

China Development Bank

Annex 7: TERMS

& CONDITIONS OF THE LWA

INDICATIVE TERMS AND CONDITIONS

US\$546,000,000 TERM LOAN FACILITY FOR KENYA AIRPORT AUTHORITY

Please note that the terms set out in this term sheet are indicative only and do not constitute an offer to arrange or finance the Facility. The provision of the Facility is subject to due diligence, the Lender's credit committee appraisal, the laws of the People's Republic of China, the approval of the government of the People's Republic of China; satisfactory documentation and is further subject to there having been, in the sole opinion of the Lender, no material adverse change in (i) the business condition (financial or otherwise), operations performance, properties or prospects of the Borrower or its affiliates, (ii) the commercial bank, loan syndication, financial or capital markets generally that would materially impair the Facility or (iii) the socio-political and economic situation of the Republic of Kenya that could adversely affect the successful completion of this transaction. The Lender is entitled to revise the financing terms, security structure and other provision of the Facility in accordance with the market conditions.

PARTIES

| | |
|-----------------------|---|
| Borrower: | Kenya Airports Authority (KAA) |
| Guarantor: | The government of the Republic of Kenya or its relevant governmental agency satisfactory to the Lender (Kenya Government) |
| Lender: | China Development Bank Corporation (CDB) |
| Export Credit Agency: | China Export & Credit Insurance Corporation (SINOSURE) |
| EPC Contractor: | A consortium jointly established by Anhui Construction Engineering Group and China National Aero-Technology Import & Export Corporation |
| Obligors: | The Borrower and the Guarantor |

Facility

| | |
|------------------------|---|
| Facility: | Term Loan Facility |
| Amount: | Up to US\$546,000,000 |
| Tenor of the Facility: | 20 years |
| Purpose: | To fund the Borrower for the construction of a new terminal and ancillary infrastructure at Jomo Kenyatta International |

Without limiting the generality of the above, any stamp duty under the laws of the Republic of Kenya and any taxes on interest (in whatever form) shall be bearable by the Borrower.

Documentation:

The Facility Agreement and other finance documents will contain provisions customary to transactions of this nature, including but not limited to conditions precedent, representations, business and information undertakings, financial covenants, default interest, break costs, increased costs, market disruption, material adverse change, set-off, administration and events of default. The relevant syndication clause shall be included in the Facility Agreement should the Lender determine to syndicate the Facility.

Costs and Expenses:

All costs and expenses (including legal fees) incurred by the Lender in connection with the preparation, negotiation, printing and execution of the Agreement and any other document referred to in it shall be paid by the Borrower promptly on demand whether or not the Facility Agreement is signed.

Governing Law:

The laws of England and Wales.

Jurisdiction:

Courts of England or arbitration under the New York Convention, to be advised by the Lender's legal counsel.

Waiver of Immunity:

Each Obligor will waive any right to immunity (sovereign or otherwise) in connection with the jurisdiction of the court, enforcement of a judgment or arbitral award or any other legal process.

Confidentiality:

This indicative terms and conditions and its contents are intended for the exclusive use of the Borrower and shall not be disclosed by the Borrower to any person other than the Borrower's legal and financial advisors for the purpose of the proposed transaction unless the prior written consent of the Lender is obtained.

Exclusivity:

During the period from the signing date hereof to the signing of the Facility Agreement, the Obligors shall not raise or attempt to raise finance for this Project.

Expiry:

The terms set out in the indicative terms and conditions are available for acceptance by the Borrower within 1 years of the signing date hereof, after which time they will expire.

Except for the sections headed "Costs and Expenses", "Confidentiality" and "Exclusivity" above, this indicative terms and conditions are not intended to be, and shall not constitute, a legally binding agreement.

Airport (the Project).

Availability Period:

To be agreed.

Term Period:

3—5 years.

Repayment:

Repayment profile to be agreed.

Front Fee:

0.5 per cent. of the maximum amount of the Facility, payable within 7 business days of the signing date of the Facility Agreement.

Commitment Fee:

0.25 per cent. per annum, on the unused and uncanceled amount of the Facility for the Availability Period. Accrued commitment fee is payable annually in arrear during the Availability Period, on the last day of the Availability Period and on the cancelled amount of the Facility at the time a full cancellation is effective.

Other Fees:

Other fees, such as arrangement fee and agency fee, to be agreed (if any).

Margin:

3.5—4.0 per cent. per annum.

Interest Payment:

Interest payment profile to be agreed.

Interest on Loans:

The aggregate of the applicable:

- (a) Margin; and
- (b) 6-month LIBOR (set by reference to the Screen Rate or, if not available, on the basis of rates provided by agreed Reference Banks).

Security:

During the whole period of the Facility, the following security interest in a form satisfactory to the Lender:

- (a) an assignment/charge over all receivables derived from any airport currently owned or managed by the Borrower, including but not limited to Jomo Kenyatta International Airport, Kisumu Airport and Moi International Airport (with necessary account security if the Lender so requires);
- (b) an insurance policy from SINOSURE;
- (c) (subject to Kenyan legal counsel's advice) a sovereign guarantee from the Kenya Government; and
- (d) a fixed and floating charge/debenture on and over the Project assets.

Cross-up and indemnity:

All payments to be made by each Obligor will be free and

Amex 8



SECRET

**MINISTRY OF TRANSPORT
OFFICE OF THE PERMANENT SECRETARY**

Blup

Telegrams "TRANSCOM" Nairobi
Telephone: 2729200, 344282
E-mail: ps@transport.go.ke

TRANSCOM HOUSE
NGONG ROAD
P.O. BOX 52692-00200
NAIROBI, KENYA
10th February, 2012

MOT/S/6.009 VOL.II/116

Eng. Stephen Gichuki
Managing Director
Kenya Airports Authority
NAIROBI

Dear Hon Wambora,

DEVELOPMENT OF GREENFIELD TERMINAL AT JKIA

Thank you for your letter Ref.KAA/ES/JKIA/658/DB dated 8th February, 2012 on the above subject.

While your letter has provided useful information, it has neither addressed the issues raised in the office of the Prime Minister's letter Ref.OPM1/INF/89/259 dated 14th November, 2011 nor have you acted on the advise and request for a draft cabinet brief communicated through this Ministry's letter Ref.MOT/AT/24/2 Vol.V/81 dated 10th January, 2012 (copies enclosed).

Accordingly, considering the magnitude of financial resources expected to be expended in this project, the Honourable Minister for Transport has directed me to instruct you not to commit the Kenya Airports Authority on any contractual arrangement on this proposed project until the issues raised by the office of the Prime Minister and this Ministry are resolved by the Cabinet as requested by the Office of Prime Minister's letter Ref.OPM1/INF/89 dated 14th November, 2011 and as advised and requested in our letter Ref.MOT/AT/24/2 Vol.V/81 dated 10th January 2012.

Please take necessary action as requested, in order to make progress on this important and urgent Vision 2030 project.

Yours *Sincerely,*

Dr Cyrus Njiru, PhD, CBS
PERMANENT SECRETARY


Encls

Copy to: **Hon. Amos Kimunya, EGH, MP**
Minister for Transport
NAIROBI

Mr. Francis T. Kimemia, CBS
Permanent Secretary/Ag. Secretary to the
Cabinet & Head of the Public Service
Office of the President
NAIROBI

Dr. Mohamed Isahakia, CBS
Permanent Secretary
Prime Minister's Office
NAIROBI

Mr. Joseph Kinyua, CBS
Permanent Secretary/Treasury
Ministry of Finance
Treasury Building
NAIROBI


Hon. Martin N. Wambora
Chairman
Kenya Airports Authority
NAIROBI

Annex 9: BOARD RESOLUTION OF 21ST FEB 2012



**MINUTES OF THE 155TH SPECIAL BOARD OF DIRECTORS
MEETING HELD ON TUESDAY, 21ST FEBRUARY, 2012 AT THE
BOARDROOM, KENYA AIRPORTS AUTHORITY
HEADQUARTERS, NAIROBI**

Present

| | | |
|------------------------|---|--|
| Hon. Martin N Wambora | - | Chairman |
| Mr. Kibuchi Muriithi | - | Director |
| Mrs. Catherine Kurja | - | Director |
| Mr. Hassan Kulow | - | Director |
| Mr. Macharia Njeru | - | Director |
| Mrs. Beatrice Gathirwa | - | Alternate Director, Ministry of Finance |
| Mr. Aggrey Busena | - | Alternate Director, Internal security |
| Mr. Isaac Kamau | - | Alternate Director, Ministry of Transport |
| Eng. Stephen Gichuki | - | Managing Director |

In attendance

| | | |
|-------------------|---|---------------------------------------|
| Mr. Peter Ondieki | - | Inspectorate of State Corporations |
| Mr. Joy Nyaga | - | Corporation Secretary |
| Mr. Francis Ngigi | - | Project Manager |

Apologies

| | | |
|----------------------|---|----------|
| Mr. Joseph Tui Denar | - | Director |
|----------------------|---|----------|

Min 1/155/2012 Introduction and Adoption of the Agenda

The meeting was called to order at about 11.30am with the Agenda for the day being confirmed as circulated.

The Agenda for the day as introduced by the Chairman was deliberations on the status of the Greenfield Terminal project following a meeting at the Ministry of Transport on 13th February 2012 where it was agreed that a Cabinet Brief be prepared.

Min 2/155/2012 The Greenfield Terminal Project

Management informed the meeting that the Greenfield Terminal Project is intended to increase passenger handling capacity as well as enhance aviation safety and security at the Jomo Kenyatta International Airport.

The tender was advertised on 23rd June, 2011 in the local print media with eligible candidates being invited to tender their bids on design and build basis for the construction of the Greenfield Passenger Terminal Complex and Associated Works at the JKIA. The bidders were also required to source for financing and submit the financial proposal with the bid.

A total of One Hundred and Ten (110) firms purchased the tender documents out of which five (5) firms returned their proposals. Opening of the bids was on 17th November 2011 and evaluation was thereafter undertaken with an award being made to An Hui Construction Engineering Group Limited (ACEG) and China Aero-Technology International Engineering Corporation (CATIC) joint venture who was the successful bidder at a sum of Kshs.64, 745,354,315 inclusive of taxes.

The successful bidder had proposed Financiers for the project as the China Exim Bank and the China Development Bank with whom Management has commenced negotiations.

The meeting deliberated on the matter at length whereupon Management informed members that KAA has capacity for the evaluation process drawn from prior experience of having undertaken several airport projects. Further, members were informed that there

were observers from the Engineers Institute of Kenya and the Kenya Civil Aviation Authority present in the Tender Committee sitting which made the award.

Based on the brief presented by Management, it was noted that the procurement process appeared to be regular but the outcome of only one successful bidder may have raised some concerns.

The Alternate Director, Ministry of Finance informed members that before inception of the project, Treasury had advised that it was important for the design and construction aspect of the project to be separated from the financing aspect. Further, Treasury had proposed that KAA uses IFC to advise on the financing aspect but KAA felt that it may be premature to engage the services of IFC at this stage.. Any borrowing therefore by KAA will require approval by Treasury.

The Alternate Director representing the Ministry of Transport informed the meeting that the Ministry had through its letter dated 10th January 2012 and 10th February 2012 raised a number of concerns with regard to the implementation process of the project so far which concerns the Ministry was of the view had not yet been addressed. The position of the Ministry is that in light of the matters raised in correspondences, the procurement process ought to be discontinued and restarted afresh on a design and build basis.

It was also noted under the provisions of the Kenya Airports Authority Act and the State Corporations Act the Authority required concurrence from the Ministry of Transport and the Ministry of Finance before proceeding with the project.

The Inspector General, State Corporations advised that if there is no concurrence by the Ministry of Transport and Ministry of Finance with regard to the project, it may be prudent for the Authority to consider exiting from the ongoing procurement process.

Management at this point informed the meeting that it had indeed written to the office of the Attorney General seeking an opinion on how to proceed in view of the contents of the letters received from the Ministry of Transport. Meanwhile, members were also requested to consider, in making their decision, the implications of re-starting the

process and the attendant delays which may serve to further worsen the congestion at the airport.

Members agreed that indeed re-starting the process would further delay the intended capacity enhancement and noted that Management may need to look at other short term solutions for the problem. Management was therefore advised to hasten the ongoing rehabilitation projects.

Further, taking due consideration of the issues emerging with regard to the matter under discussion, the meeting noted that it may be prudent to re-start the Board Procurement Oversight Committee.

Board Decision

Upon taking into consideration all the views expressed, the Board of Directors RESOLVED that:-

1. KAA should annul the ongoing procurement process and re-start the same afresh.

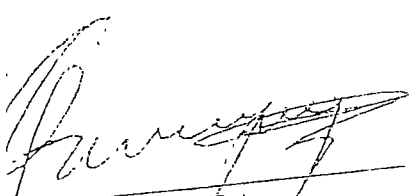
Dissent

Director Kibuchi Muriithi requested that his dissent with the decision of the Board be recorded as follows:-

- That it is preferable that the legal opinion earlier sought by Management from the Attorney General and recommended by external counsel be received first.
 - That members of the Board had not received a detailed brief from Management to enable them make a comprehensive decision.
 - That he objects to the proposed exit if no proper reasons are given for such action.
2. Management to prepare and forward to the Ministry of Transport a comprehensive cabinet paper giving details of the project as well as the position of the Board of Directors as in (1) above on the proposed exit from the ongoing implementation process.

management to prepare for consideration of the Board draft Terms
reference for the proposed Board Procurement Oversight Committee.
being no other business the Meeting ended at about 1.15pm.

FORMED AS A TRUE RECORD OF THE PROCEEDINGS OF
BOARD.


TIN WAMBORA
IRMAN


JOY NYAGA
CORPORATION SECRETARY

DATE: 29th MARCH 2012

DATE: 29th March, 2012

Annex 10: AG's opinion

THE STATE LAW OFFICE

Telephone: (020) 221743/221744
When replying, please quote

Ref. No.
and date

AG/CONF/2/23 VOL. II (67)



ATTORNEY GENERAL'S CHAMBERS
P. O. Box 40112-00100
NAIROBI, KENYA
22nd February, 2012

Eng. S.M. Gichuki
Managing Director
Kenya Airports Authority
P.O. Box 19001-00501
NAIROBI



Dear

RE: LEGAL OPINION ON THE DEVELOPMENT OF GREENFIELD TERMINAL AT JOMO KENYATTA INTERNATIONAL AIRPORT.

We refer to your letter dated 14th February, 2012, in which you had requested for our opinion on the issues raised in a letter by the Permanent Secretary, Ministry of Transport dated 10th January, 2012.

In granting our opinion we have examined the documents availed to us that is:

1. Letter by the Permanent Secretary Ministry of Transport dated 10th January 2012.
2. The request for proposal dated 12th August 2011.
3. The technical and financial evaluation report dated 14th December 2011.
4. The minutes of the KAA Board of Directors dated 9th March 2011.

We have noted the sequence of events as follows:

1. The Kenya Airports Authority (Authority) in a bid to enhance its passenger handling capacity and improve efficiency of hub operations at the Jomo Kenyatta International Airport plans to design and construct a new Greenfield terminal complex.

2. Pursuant to the foregoing, the Authority invited bids through open tendering in June, 2011 from eligible candidates for financing, design, construction of the terminal building and associated works, supply, installation of equipment, testing, commissioning and handing over the terminal to the Authority.
3. The eligibility criteria for the tender required the bidder to comply with the following:
 - a) Is a legal entity incorporated in the country or domicile or a joint venture linking such entities for purposes of carrying out and completing the works in the tender.
 - b) Provide evidence of having carried out and completed at least one similar sized international airport project in the last ten years.
 - c) Provide evidence of having carried out and completed at least one other urban mixed use commercial development of a similar floor area in the last 5 years.
 - d) Provide a consultant or link up with a firm of consultants who would have designed and supervised the construction of at least one similar sized international airport in the last 5 years.
 - e) Submit a letter of commitment to finance the project from a financier(s).
 - f) Provide a surety of Ksh 300 million.
 - g) Meet the minimum annual construction turnover of US \$ 200 million or equivalent in other currencies for the entity or for the lead firm.
 - h) The candidates will source for a suitable financier(s) meeting the minimum terms and conditions in the tender document.

The bidding process and Mode of evaluation

Bidding Process

4. The request for proposal was advertised in the local print media on 23rd June, 2011. 120 persons purchased the tender documents and only 5 firms' submitted proposals by the 17th November, 2011 which was the deadline.
5. *The firms that submitted their bids were the following:*
 - a) *Anus Construction Engineering Group Co. Ltd (ACEG) & China national Aero-technology International Corporation (CATIC);*
 - b) *Beijing Construction Engineering Co. Ltd (BECC) & Sinhydro Corp. Ltd joint venture;*
 - c) *Larsen & Toubro Ltd;*
 - d) *Citibank; and*
 - e) *SIFIKILE.*

Mode of evaluation

6. The evaluation of the tender was done by following 3 steps, that is to say, preliminary, technical and financial evaluation.
7. Out of the five (5) firms that submitted proposals, one (1) firm (Citibank) was disqualified as it had only submitted a financial proposal.
8. The four (4) firms that remained were subjected to a preliminary examination to determine those that met the minimum mandatory requirements. Only two (2) firms (ACEG & CATIC and Larsen & Turbo) met these requirements and thereby qualifying for the detailed technical examination.
9. The qualifying score set out for the technical evaluation was 70%. ACEG & CATIC was ranked first with a score of 85.96% while Larsen & Turbo was ranked second with a score of 62.74%. Thus, ACEG &

CATIC was responsive to the technical evaluation and qualified to undergo the financial evaluation.

10. The financial evaluation was done by comparing the pre-bid estimate for works (which was Kshs 68,305,021,899.13 including taxes) against the financial proposal of ACEG & CATIC which was Kshs 64,745,354,315.00. Although the financial bid was -5.21% as compared to the pre-bid estimate, the same was within the 25% off the pre-bid estimate.
11. Further, the bidder had submitted two (2) letters of intent/interest to finance the project from China Development Bank Corp & China Exim Bank respectively.
12. With a combined financial and technical evaluation score of 90.98%, the bidder was found to be responsive to the conditions set out in the tender documents.
13. Subsequently, the Authority issued the successful bidder with a notification of award of the tender vide a letter dated 16th December 2011 and the bidder accepted the award on 19th December 2011.

The issues raised by the Permanent Secretary, Ministry of Transport

14. The Authority received a letter from the Permanent Secretary which stated as follows:
 - a) That the outcome of the bidding process did not produce an acceptable minimum number of technical and financial proposals that could be compared; and
 - b) None of the bidders offered to provide finance therefore the process should be undertaken on the basis of design and build only.
15. The Permanent Secretary, therefore, directed that a new tender be issued on a design, construct, cost and completion time etc and the financing was to be an added advantage.

The legal issues to be considered

- I. Whether the bidding process produced an acceptable minimum number of technical and financial proposals
16. The Public Procurement and Disposal Act of 2005 does not define competitive bidding. What the Act does is to provide for various methods of procurement; including open tendering, direct tendering and restrictive tendering.
17. The open tendering method of procurement is deemed to be the most competitive. The glossary of the Public Procurement & Disposal General Manual (PPDGM) which is issued pursuant to Section 9(c) (i) of the Act, indicates that open tendering is the preferred procurement method of Kenya that implies opening competition to the market with any restrictions. This can be compared to direct procurement that does not require use of competitive bidding.
18. The procedures to be followed in relation to open tendering are set out in Parts V and IV of the Act and Public Procurement and Disposal Regulations of 2006, respectively.
19. It is noteworthy that none of the provisions in the Act and the Regulations specifies the minimum number of technical and financial proposals to be evaluated. The requirement for competition can only be inferred from the use of terms such as, "comparison of tenders", "ranking" and "lowest evaluated price".
20. An attempt to set a minimum number of bids to be evaluated is made in the PPDGM. Part (o) of section 7.2 (Open Tendering Method) states that:

"Where only one or two bids are determined responsive the procuring entity shall have the option of proceeding with the evaluation or determining the entire tender non-responsive."
21. The PPDGM goes on to clarify that a procuring entity can only exercise this option if it included the same in the bidding documents.

However, it is not clear which of the two options needs to be included in the bidding documents – proceeding with the evaluation or determining the entire tender non-responsive.

22. In the instant tender, five firms submitted bids. One firm was disqualified. The remaining four firms were subjected to a three-step evaluation process. The first step was the preliminary evaluation and the four firms were subjected thereto after which two firms failed to meet the minimum mandatory requirements. Thus, only two firms proceeded to the second step, being technical evaluation. One firm was found unresponsive as a result of which only one firm proceeded to the third step – financial evaluation.

II. Whether the bidders offered to provide finance

23. We have already indicated that the eligibility criteria for the instant tender required the bidders to:

- a) Submit a letter of commitment to finance the project from a financier(s); and
- b) Source for a suitable financier(s) meeting the minimum terms and conditions in the tender document.

24. In this regard, the successful bidder submitted two letters of intent/interest to finance the project from China Development Bank Corp & China Exim Bank, respectively.

25. The fact that these two letters were submitted is sufficient proof that the successful bidder had sourced for the two financiers.

III. The directive to terminate the procurement proceedings and re-tender

26. There are three instances where procurement proceedings may be terminated:

- a) *Section 36* of the Act permits a procuring entity to terminate procurement proceedings at any time without entering into a contract. Where a procuring entity takes this step, the law requires it to promptly notify all the bidders and to give reasons for such termination to any bidder who requests for them. It is noteworthy that this provision has been qualified by *clause 3.27.2* of the request for proposals which restricts the right of the Employer to annul the tendering process to "any time prior to award of contract";
- b) *Section 65* of the Act requires a procuring entity to notify all the bidders that none of the bids was responsive. This notification implies termination; and
- c) Where only one or two bids are determined responsive and the procuring entity has stated in the bidding documents that it shall opt to determine the entire tender non-responsive, as per the PPDGM.

27. The instance in (b) does not apply in the instant case, as there was a responsive bid while (c) is subject an express provision in the bidding documents. The Authority can only exercise this option if it includes it in the bidding documents.

Way forward

- I. In answer to question 1, going by the minimum number of bids indicated in the PPDGM and assuming that the Authority had included that option in the tender documents, the Authority ought to have exercised the option to determine the entire tender unresponsive after the technical evaluation, as only one firm emerged responsive.

Since the Authority proceeded to evaluate a sole financial bid, then the Authority rightfully opted to exercise the second option indicated in the PPDGM. That is to award the tender to the responsive bidder. Therefore, it is our view that the bidding

process produced an acceptable minimum number of technical and financial proposals.

- II. The second issue as to whether the bidders offered to provide finance. it is our view that the bidders were not required to provide finance, instead they only had to propose a financier(s) and we are informed that the responsive bidder gave two letters of intent/interest to finance the project from China Development Bank and Exim Bank of China.
- * III. Thirdly, as regards the directive to terminate the procurement proceedings and re-tender, the only possibility of terminating the instant procurement proceedings is under Section 36 of the Act. However, *clause 3.27.3* of the request for proposals restricts the Authority's right to annul the tendering process to "*any time prior to award of contract.*"

Thus, by seeking to terminate the procurement process after notification and acceptance of award of contract, the Authority will not only be contravening the provisions of clause 3.27.3 of the request for proposals but also acting in bad faith; thereby undermining the integrity and fairness of the procurement process.

Yours


GITHU MUIGAI,
ATTORNEY GENERAL



MINUTES OF THE 157TH SPECIAL BOARD OF DIRECTORS MEETING HELD ON THURSDAY, 22ND MAY, 2012 AT THE BOARDROOM, KENYA AIRPORTS AUTHORITY HEADQUARTERS, NAIROBI

Present

| | | |
|------------------------|---|---|
| Hon. Martin Wambora | - | Chairman |
| Mrs. Catherine Kuria | - | Director |
| Mr. Hassan Kullow | - | Director |
| Mr. Macharia Njeru | - | Director |
| Mr. Gabriel Kivuti | - | Director |
| Mrs. Beatrice Gathirwa | - | Alternate Director, Ministry of Finance |
| Mr. Aggrey Busena | - | Alternate Director, Office of the President |
| Mr. Isaac Kamau | - | Alternate Director, Ministry of Transport |
| Eng. Stephen Gichuki | - | Managing Director |

In attendance

| | | |
|-------------------|---|--|
| Mr. Peter Ondieki | - | Inspector General, Inspectorate of State Corporations |
| Ms. Joy Nyaga | - | Corporation Secretary |

Min 1/157/2012 Introduction and Confirmation of the Agenda

The meeting was called to order at about 10:15 am with the Chairman welcoming all members present to the meeting. The Chairman also took the opportunity to formally welcome the newly appointed director, Mr. Gabriel Kivuti to the Board of Directors whose professional attributes he noted would no doubt serve to further enrich the skills diversity in the membership of the Board.

The Chairman further congratulated Mrs. Catherine Kuria and Mr. Hassan Kullow on their reappointment to serve for a second term in the Board of Directors.

The Agenda for the day was adopted as circulated.

Min 2/157/2012 Brief on the Industrial action- KAA Unionisable Employees

Management was invited to make the presentation whereupon members were informed that following the issuance of a strike notice by the Aviation and Allied Workers Union the umbrella body for the KAA unionisable employees the Authority moved to Court on 4th April, 2012. The Industrial court issued an order restraining unionisable employees from participating in the strike but notwithstanding service of the order having been effected upon the union leaders the strike still proceeded on Friday the 6th of April, 2012.

Through a press statement issued on Saturday the 7th of April, 2012 the striking workers were notified to report back to work by Sunday the 8th of April, 2012 failing which they would be deemed to have deserted duty. A majority of the employees did not heed the notification leading to termination of their employment effective Monday 9th April, 2012.

In a court attendance on 25th April, 2012 the Union leaders indicated willingness to explore an out of court settlement based on which the court ordered that the matter be referred to the Ministry of Labour for purposes of appointing a conciliator. The conciliator was appointed pursuant to the order and in a meeting held on 30th April, 2012 parties agreed that all employees whose services had been terminated and were willing to return be reinstated

effective 1st May, 2012 but in the meantime management be at liberty to apply disciplinary measures against any employee who was found to have committed any act (save from participation in the strike) attracting disciplinary action.

It was also agreed that the reinstated employees would not be entitled to wages or any other payments for the period that they were not at work. The conciliator then directed that the parties resume negotiations chaired by a representative from the Federation of Kenya Employers for purposes of finalising on the disputed items under the Collective Bargaining Agreement.

Negotiations were ongoing with regular updates being presented to Court. The meeting deliberated on the matter at length where the following observations were made;

- It is necessary that management keeps the Board of Directors well informed of what transpires in the Authority to avoid instances where there may appear to be lack of communication between the Board and management.
- An informal interaction between members of the Board and management may be of assistance in improving communication

Board Decision:

The Board of Directors therefore **directed** management to:

1. Proceed with the negotiations towards a possible out of court settlement of the matters outstanding under the Collective Bargaining Agreement and to report regularly on the progress;
2. Further with respect to the wages before settling on any percentage increment higher than 9%, management to consult.
3. Additionally, the Board **mandated** Mr. Gabriel Kivuti and Mrs. Catherine Kuria to take leadership in proposing options for an informal bonding session for members of the Board and senior management.

Min 3/157/2012: Lease between Transglobal Cargo Handling Company Limited and Kenya Airports Authority – Update.

The meeting was informed that the Board of Directors considered the Transglobal Cargo Center Limited special audit report in its 156th meeting held on Thursday, 29th March, 2012. In the meeting, the Board of Directors took note of the recommendations by the Audit Committee of the Board where after it was resolved that the recommendations be adopted as resolutions of the Board..

Management reported that subsequent to the 156th Board meeting the following had been done;

- Management had communicated through external counsel to Transglobal that the Lease and Concession agreements executed with the Kenya Airports Authority should be reconstructed in line with the approvals made by the Tender Committee but no response had been received,
- Management had also communicated to Transglobal that the Consent to charge issued on 27th April, 2010 shall be revoked and further that KAA would be engage the lands office towards cancellation of I.R No. 127800/1 registered against the JKIA title..
- Management had communicated with the former managing director on the matter of the consent to charge
- External counsel was in the process of reviewing the draft land policy to facilitate alignment with the new land laws enacted in May, 2012.

Members of the Board deliberated on the matter at length where it was observed that it was important that the former managing director be formally communicated to with regard to the consent to charge as this would not only be good for record purposes but would also avail him the a fair chance to respond to the issue. His response would also facilitate charting out of the next course of action to be taken.

Board Decision

Accordingly, the Board of Directors **directed** management to;

1. Immediately write to the former managing director on the issue of the consent to charge and upon receipt of a response confirming that he did not execute the consent to write to the Standard Chartered Bank Limited informing that the consent to charge is invalid;
2. Require Transglobal to respond on the matter of the Lease failure to which management should proceed with the next action in which it should also be considered whether the process would require the involvement of the Lands Commission under the new land legislation;
3. Consider and chart out how best to deal with the press coverage of the matter.

Min 4/157/2012: The Greenfield Terminal Project - JKIA

The Chairman invited Management to recap on what had so far transpired on the matter whereupon members noted that they had discussed the matter in the 155th and 156th meetings held on 21/02/2012 and 29/3/2012.

On the 155th session, it had been resolved that the Authority ought to annul the ongoing procurement process for the project and thereafter restart the same afresh. Management was also mandated to prepare and forward to the Ministry of Transport a cabinet paper giving details of the project and the procurement process as well as the Board of Directors' position. Finally, the Board also required management to prepare terms of reference for a proposed Board Procurement Oversight Committee.

In the subsequently held 156th meeting, the Board of Directors was informed by management that by a letter dated 6th March, 2012 the office of the Prime Minister had communicated to KAA that the matter of the procurement process for the Greenfield Terminal project had been referred to the Infrastructure Committee of Cabinet for guidance. As such, it was found prudent to await the findings of the said Committee before taking any further action.

Members deliberated on the issue at length and made the following comments and observations;

- The Cabinet Committee on Infrastructure had met three times and on the last occasion had resolved that the Minister of Transport and the Attorney General should propose a way forward on the matter.
- The opinion and findings of the Attorney General and the Ethics and Anti corruption Commission may not have substantially delved into the actual process and may not have considered the concerns raised by both the Ministry of Transport and Ministry of Finance.
- In arriving at the decision on whether to proceed with the process it should also be noted that the matter also substantially concerns tax payers money.
- The Inspectorate of State Corporations had also conducted an investigation on the matter and presented a report to the Cabinet. In the report it was pointed out among other issues that stakeholder involvement would have been key to the process taking into consideration the size of the project as well as the fact that the same was indeed a national project.
- The project for the re-organisation of the JKIA terminal building was now on course and noting the projected capacity enhancement (by about 9million at completion), this would serve to reduce congestion and further ease the urgency for the Greenfield Terminal project.
- The Technical Committee of the Board ought to give regular updates on ongoing projects.
- There is need for the Board of Directors to conduct a performance appraisal of itself as well as of management so as to promote a culture of self monitoring and improvement

Board Decision

The Board of Directors therefore **resolved** as follows;

1. That the Board of Directors affirms the Resolution passed in its 155th meeting that the procurement process for the Greenfield Terminal project be annulled and thereafter it be restarted afresh.
2. That it is proposed that a meeting be convened by the Ministry Transport at the earliest for key stakeholders including Kenya Airports Authority, Kenya Airways, Vision 2030 and Kenya Civil Aviation Authority for purposes of charting the way forward on the project.
3. The Technical Committee to make presentation on ongoing projects in KAA at the next meeting of the Board.
4. The Staff Committee of the Board to consider developing an instrument to be used in conducting the proposed self appraisal of the Board and management.

There being no other business the meeting ended at about 1:15pm.

CONFIRMED AS A TRUE RECORD OF THE PROCEEDINGS OF THE BOARD.

MARTIN WAMBORA
CHAIRMAN

JOY NYAGA
CORPORATION SECRETARY

DATE: _____

DATE: _____

12
Arbitration Committee

RECOMMENDED TERMINATION OF
TENDER



**MINUTES OF THE 206TH TENDER COMMITTEE MEETING (SPECIAL)
HELD ON 27TH JULY 2012 IN THE BOARD ROOM 3RD FLOOR.**

PRESENT

- | | |
|--------------------------|--------------------------|
| 1. Eng Philemon Chamwada | - GM (P+ES)(Chairman) |
| 2. Mrs. Lucy Mbugua | - GM (M& BD) |
| 3. Mrs. Joy Nyaga | -Corporation Secretary |
| 4. Mr. Henry Ogoye | -Head of Corp. planning |
| 5. Eng. Simon Githaiga | - Eng. HQs |
| 6. Mr. Edward Kobuthi | - Airport Manager (JKIA) |
| 7. Mr. Kennedy Murambi | -Alt. GM (ICT) |
| 8. Mr. Richard Ngovi | - Ag.GM(S.S.) |
| 9. Mr. Allan Muturi | - GM (P & L) (Secretary) |

AGENDA

1. Adjudication and award
2. A.O.B

MINUTE NO 1: CONFIRMATION OF MINUTES

The Chairman called the meeting to order at 9.15 am and introduced the members to the meeting.

MINUTE NO. 2: ADJUDICATION AND AWARD

[Handwritten signatures]

PAPER NO. 2099-

TENDER FOR THE CONSTRUCTION OF THE GREENFIELD TERMINAL COMPLEX AND ASSOCIATED FACILITIES- KAA/ES/JKIA/658/DB

The tender committee observed that the above contract had been awarded on 15th December, 2011 to M/s An Hui Construction Engineering Group Ltd (ACEG) and M/s China Aero-Technology International Engineering Corporation (CATIC) - joint venture.

The tender committee was further informed that following the Board of Directors resolution passed in its meeting held on 21st February, 2012 and 25th May, 2012 respectively, the Board reaffirmed the earlier decision terminating the procurement process in respect to tender no KAA/ES/JKIA/658/DB for the design and construction of the Greenfield Terminal Complex and Associated Works.

The tender committee considered the Board of directors' resolutions and noted the magnitude of the project and the position of the Board of Directors as expressed in their resolutions. The tender committee's position was that the continuation of this tender in its current form may not be tenable and as such recommended its termination.

A.O.B.

There being no other business the Chairman closed the meeting at **11.45am**

Prepared By: -



MR. ALLAN MUTURI
SECRETARY

Confirmed By:-



ENG. PHILEMON CHAMWADA
CHAIRMAN



Kenya Airports Authority

Meeting Attendance

Register

Meeting Details

Agenda / Meeting Type: Tender Committee Meeting No. 206 (Special)

Date: Venue: Conference Room

Convener: Secretary – Tender Committee

Date 27th July 2012

| | NAME | DEPT | DESIGNATION | SIGNATURE |
|---|-----------------|-------------|-------------|--------------------|
| 1 | P CHAMWA DA | ENR | GM (P&E) | <i>[Signature]</i> |
| 2 | Edmond Kibuka | JICA | AIRPORT MGR | <i>[Signature]</i> |
| 3 | HENRY OGOYE | CP | HRP | <i>[Signature]</i> |
| 4 | Lacey Mburu | M&B | GM | <i>[Signature]</i> |
| 5 | R-K NGOVI | SAFETY SEC | AG-GM | <i>[Signature]</i> |
| 6 | Simon Githuige | Eng | Elec Eng | <i>[Signature]</i> |
| 7 | Awan Mburu | Procurement | Com P&L | <i>[Signature]</i> |
| 8 | JOY NYAGA | LEGAL | CS | <i>[Signature]</i> |
| 9 | KENNEDY MURAMBI | ICT | SYS ADMIN | <i>[Signature]</i> |
| | | | | |
| | | | | |
| | | | | |

[Pick the date]

Meeting Planned Start time..... Actual Start Time 9:15 AM End time 11:45 AM



Adhika 13 = Memo from KAA MD
TD - GM - Procurement
LOGISTICS

MEMO

TO: GM/PROC. & LOG.

FROM: MANAGING DIRECTOR

DATE: 31ST JULY 2012

REF: KAA/ES/HQ/522/C

SUB: TENDER FOR DEVELOPMENT OF GREENFIELD TERMINAL AT
JOMO KENYATTA INTERNATIONAL AIRPORT

I refer to your minutes of 206th Tender Committee meeting of 27th July, 2012. In reaching your decision, the attached Tender paper number 2099 was used.

After perusing the letters Ref. OP/CAB.1/65A and AG/CONF/2/C/23 Vol.II, I wish to withhold any action on Tender Number KAA/ES/JKIA/658/DB for the design and construction of the Greenfield Terminal complex and Associated Works until we hear from the Cabinet as instructed by the Head of Public Service and Secretary to the Cabinet and Office of the Prime Minister. As per section 27(2) of the procurement and disposal act 2005 and the PPOA circular No.2/2009, I as the accounting officer must ensure compliance with the law.

As the accounting officer, it is imperative that I bring some clarity on some of the points indicated in Tender Paper 2099 and also bring to your attention some developments that are not reflected in that paper but that have major ramifications on your deliberations.

1. Issues with Tender Paper no.2099 used to deliberate your recommendation on the Greenfield Project.

A. Discrepancy on intended recommendation:

- i. The tender paper states that indeed the process was regular. Therefore, it may be difficult to justify any termination to FPOA as required in section 36(7) of the procurement law.
- ii. The paper again contradicts the desire of the board as it states categorically that the decision of the board is to await the outcome of the Cabinet. Therefore, any termination could be deemed as going against what the board resolved.

B. Anomalies and inaccuracies contained in the Tender Paper No.2099

- i. Bullet point 2 states that before inception of the project, the Board had advised that the design and construction aspect be separated from the financing aspect. This is incorrect as seen in board minutes for the 147th and 149th Board meetings. The Board in those meetings directed that this project be done as a design, build and finance.
- ii. The Ministry of transport letters referred to in bullet point 3 was subsequently clarified by KAA (letters attached).
- iii. Bullet 4 quotes an opinion of the Inspectorate of State Corporations. It states that in the absence of concurrence from the Ministry on the project, then the Authority should consider exiting the procurement process. The signed minutes of the said Board meeting states "The Inspector General State Corporations advised that if there is no concurrence by the Ministry of Transport and Ministry of Finance with regard to the project. KAA is yet to receive any non-concurrence of the Greenfield project from any Ministry of the Government of Kenya. Actually the two Ministries have approved the project by virtue of the Board approvals obtained in which they were represented. *where
is the*
- iv. On point number 3, there has not been any Audit of the procurement process of the Greenfield Tender by Inspectorate of State Corporations that this Authority is aware of. *OK
The*
- v. The last bullet point, as stated in several communications on record including from the Secretary to the Cabinet and the Secretary to the Cabinet Sub-Committee on Infrastructure, there is yet decision to be

made on this procurement. This Authority has not received any report recommending termination of the procurement process.

In future, the tender committee should deliberate papers that have factual documentation to avoid the perception that decisions are skewed in a particular direction.

2. The Authority is in receipt of a letter from the Office of the Prime Minister dated 6th March, 2012 stating that the Cabinet will make the decision on the way forward. KAA was further instructed to not make any decision on the procurement process until the Cabinet directs the way forward. KAA is yet to receive that directive and thus it would be deemed insubordinate and an abuse of office to act contrary to this.
3. The Attorney General, the chief legal advisor to the Government as well as a Cabinet member, has expressly stated in his legal opinion dated 16th April, 2012 that we are in contract with Anhui Construction Engineering Group Ltd for the design and construction of the Greenfield Terminal. This means that the Tender Committee should be deliberating termination of a contract. Following a Board directive of 26th July, 2012 to terminate this tender, I sought further advice from the Attorney General. The AG's recommendation is that the Authority should not seek to create a parallel process to that of Cabinet. This will expose the Authority to legal liabilities (letters attached).
4. In an earlier opinion of 16th April, 2012 the Attorney General states that termination will expose us to financial damages and claims. Thus the Authority should not attempt to terminate the awarded contract. I note that this legal advice was not circulated as part of the tender paper number 2099 which the Corporation Secretary prepared (opinion attached).

Following the Board resolution dated 26th July, 2012, the following day I, received a letter from the Head of Public Service and Secretary to the Cabinet dated 27th July, 2012. The Head of Public Service has stated that the Board of Directors action to compel the Managing Director to terminate this contract is in bad taste

and it is disrespectful to the Cabinet and further directed that it should be given until the next Cabinet meeting is called (letter attached)

Given the magnitude of this project, its national importance, the underlying economic impact, the urgent requirement of this project by our stakeholders, the public interest as well as our mission to make JKIA the preferred hub of choice in this region, I suggest we exercise caution.

It is also my responsibility under the Kenya Airports Authority Act Cap 395 and the State Corporations Act Cap 446, to safeguard and protect the Authority against financial loss and potential litigation as envisaged by the Hon. Attorney General. Further, I note that the investigation by the Ethics and Anti-corruption Commission cleared the process of any wrong doing and advised that the project be implemented with integrity.

My decision is also made on the basis of good governance and prudence given that my superior authorities have instructed KAA to await the Cabinet decision (the supreme authority of the Government of Kenya) on the way forward. Given the magnitude of this Project, it is absolutely in order to wait another couple of weeks for the Cabinet to deliberate as indicated by the Secretary to the Cabinet, which should be done in its next sitting.

S. M. Gichuki

ENG. S. M. GICHUKI
MANAGING DIRECTOR

AG
KAA Mtg
KAA Board
PPOA
EACC
MOT.